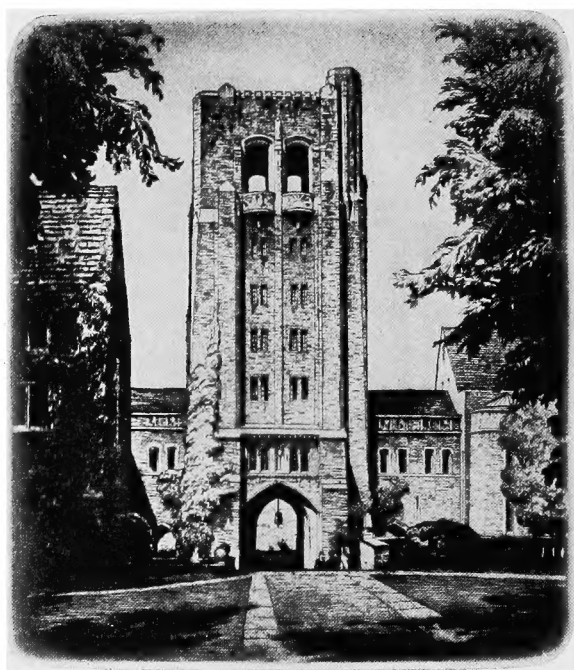


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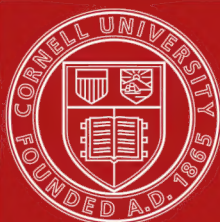
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THE
LAW OF CONTRACTS.

BY
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LATE OF THE INNER TEMPLE, BARRISTER-AT-LAW,
AUTHOR OF "LEADING CASES," "A TREATISE ON MERCANTILE LAW,"
ETC.

Seventh American,
FROM THE EIGHTH LONDON EDITION.

BY
VINCENT T. THOMPSON, Esq., M. A.,
OF LINCOLN'S INN, AND OF THE NORTH-EASTERN CIRCUIT, BARRISTER-AT-LAW,
ASSISTANT RECORDER OF LEEDS.

WITH
NOTES AND REFERENCES TO BOTH ENGLISH AND AMERICAN
DECISIONS,

BY
WILLIAM HENRY RAWLE
AND
GEORGE SHARSWOOD, LL. D.

AND WITH
ADDITIONAL NOTES AND REFERENCES TO RECENT AMERICAN
CASES,

By JOHN DOUGLASS BROWN, JR.

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PREFACE

TO THE SEVENTH AMERICAN EDITION.

THE text of this edition is that of the last (eighth) English edition. The elaborate annotations of his distinguished predecessors (which have been, with very slight exceptions, retained) have made it unnecessary for the present American editor to add much distinctively new matter, and his work has been mainly the rearrangement of this material, and the citation of later authorities. The notes of Mr. Rawle and Judge Sharswood have been indicated by the letters R. and S. respectively. Where it seemed proper to distinguish new matter inserted in these notes, it has been enclosed in brackets.

The citations throughout the American notes have been carefully verified by A. H. Wintersteen, Esq., of the Philadelphia Bar.

J. D. B. JR.

PHILADELPHIA, May 1st, 1885.

PREFACE

TO THE EIGHTH ENGLISH EDITION.

IN bringing this Edition of Smith's Lectures on the Law of Contracts up to the existing state of the law, the present Editor has endeavoured as before to make his own additions as short as possible, confining them to cases of real importance and to such alterations as were rendered necessary by recent legislation. The Editor trusts that the present Edition will be found no less acceptable than its predecessors.

It may be interesting to add that, as appears from the preface to the First Edition, these lectures were delivered at the Law Institute in 1842; at which time the Author was thirty-three years old (*vide* the interesting memoir of the late John William Smith, by the late Samuel Warren, Esq., Q.C., which originally appeared in *Blackwood*, vol. 61, and which has since been included in the edition of Mr. Warren's Works). The First Edition was brought out in 1846, after the

Author's death, by Mr. Jelinger C. Symons. The subsequent editions up to the sixth were by the late Mr. J. G. Malcolm, formerly Master of the Crown Office. For the Sixth and subsequent Editions the present editor is responsible.

V. T. T.

PEASE'S BUILDINGS, SOUTH PARADE, LEEDS,

Dec., 1884.

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THE LAW OF CONTRACTS.

LECTURE I.

ON THE NATURE AND CLASSIFICATION OF CONTRACTS AND ON CONTRACTS BY DEED.

THE whole practice of our English Courts of Common Law (a), if we except their criminal jurisdiction and their administration of the law of real property, to which may be added those cases which fall within the fiscal jurisdiction of the Court of Exchequer, may be distributed into two classes, *Contracts* and *Torts*. Of this you can easily satisfy yourselves by putting to your own minds any conceivable case of legal inquiry. If it do not involve a question of criminal law, or of the title to land, or of Exchequer jurisdiction, you will find that it resolves itself into a *Contract* or a **Tort*. [*2] Thus, suppose it to be the non-performance of a covenant, the non-payment of a bond, the dishonour of a bill of exchange, the non-payment of rent, the default of a surety,—these are all subjects of inquiry arising from contracts. So, again, if it involve an assault on the person, an injury to the reputation by libel or slander, a nuisance to the dwelling, a conversion of property,—these are only so many descriptions of torts. And as the subjects of legal inquiry divide themselves, so do the forms in which the inquiry is carried on; for

(a) The Superior Courts of Common Law are now merged in the Supreme Court. See 36 & 37 Vict. c. 66 (Supreme Court of Judicature Act, 1873), s. 3.

all actions, as you are aware, are of TORT or of CONTRACT, a division which, as you see, is rendered necessary by the very nature of things, and does not result from any arbitrary principle of arrangement.

Now, therefore, the whole subject-matter of the inquiries about which our Courts of Law are conversant (excepting the cases I have excepted) being distributable into these two heads, *Contract* and *Tort*, I am about to take the former of them, that of *Contract*, and to state those principles of every-day recurrence which govern the law of England relative to contracts, and which it is absolutely necessary that every lawyer should bear constantly in mind, and have (to use the ordinary expression) at his fingers' ends, if he will avoid falling into egregious mistakes in the course of his daily practice.

All contracts are divided by the Common Law of England into three classes:—

- *1. CONTRACTS BY MATTER OF RECORD.
- [*3] 2. CONTRACTS UNDER SEAL.
- 3. CONTRACTS NOT UNDER SEAL, OR SIMPLE CONTRACTS.¹

With regard to contracts by matter of record, they are so little used in the ordinary affairs of private individuals, that I may dismiss them in a very few words. A Record is a memorial or remembrance on rolls of

¹ A useful division of this third class is adopted by Mr. Leake (Digest of the Law of Contracts, pp. 21, 22, and Chap. I., Sec. 2). Following Austin, he distinguishes between simple contracts formed by agreement, and contracts implied in law. To the first class he assigns, however, not merely *express* agreements, but such contracts as are proved by circumstantial evidence manifesting the intention of agreement by the parties: *Thorn v. City of London*, L. R. 10 Ex. 123; while he uses the term "implied in law" to denote the class of simple contracts raised by law from facts and circumstances independent of agreement and in which an agreement or promise, if implied at all, is an implication of law only, and has no existence in fact. This class of contracts is discussed below, pages *197 *et seq.*, but their character would perhaps be more easily understood if the distinctive classification and treatment of Mr. Leake had been adopted.

parchment (*b*); and such memorial is not a record until enrolled in the proper office (*c*). At an early period of our law, statutes merchant and statutes staple, which are both contracts of record for the payment of debts, were commonly in use. Subsequently, recognizances in the nature of a statute staple were established (*d*). These contracts are, however, now almost unheard of. The only contract of record with which we now occasionally meet is a recognizance, and that oftener in matters in which the Crown is concerned than between subject and subject (*e*).¹ Thus an ordinary mode of compelling a witness to attend and prosecute or give evidence

(*b*) Co. Litt. 260 a.

(*c*) *Q. v. Hughes* and others, 36 L. J. Privy Coun. 23; Com. Dig. Record.

(*d*) 13 Ed. I., stat. 3, c. 1 (The Statute of Merchants); 27 Ed. III., c. 9; 23 Hen. VIII., c. 6; 8 Geo. I., c. 25. See also 2 Bl. Comm., p. 160, ed. by Coleridge.

(*e*) It seems that the recognizance of a receiver under the Court makes moneys due from him and unaccounted for, a debt of record as long as the recognizance exists. *Seagram v. Tuck*, 18 Ch. Div. 296; 50 L. J. (Ch.) 572.

¹ A statute provision requiring a deed or contract to be recorded for safe keeping, and notice to purchasers, does not thereby make it a record, in the technical sense of that term. And it has been so held even in cases in which the legislature have directed the process upon such deed or contract to be by *scire facias*, a writ which at common law lies on a record only. Thus, in Pennsylvania, it has been decided that *nul tiel record* is no plea to a *scire facias* on a mortgage: *Frear v. Drinker*, 8 Pa. St. 520; see also that the registry of a mechanic's lien is no record, and to a *scire facias* upon it, the plea of *nul tiel record* is a nullity, *Davis v. Church*, 1 W. & S. 240. A recognizance is a debt of record, entered into before some court, judge, or magistrate, having authority to take the same: *Com. v. Emery*, 2 Binn. 431; *Pace v. Mississippi*, 25 Miss. 54. If the recognizance does not show that the court or judge had jurisdiction of the subject-matter, it is void: *Bridge v. Ford*, 4 Mass. 641, 7 Mass. 209; *Com. v. Bolton*, 1 S. & R. 328. It need not be under the seal of the party: *State v. Root*, 2 Rep. Const. Ct. 123; *Hall v. State*, 9 Ala. 827; nor signed. A certificate that it was acknowledged on the day of its date is sufficient: *Madison v. Com.*, 2 A. K. Marsh. 131; *Com. v. Mason*, 3 Ib. 456. It cannot be aided by parol averments. If made returnable at a time when no term of court is holden, and there is nothing in the record from which the court can infer that such time was intended to describe the time of the next session of the court, the recognizance is void: *Treasurer v. Merrill*, 14 Vt. 64; *The State v. Crippen*, 1 Ohio St. 399. See *Com. v. Bolton*, 1 S. & R. 328. A paper purporting to be a recognizance, but taken by one not

[*4] *in a criminal case is by *recognizance*, in which he binds himself to the Queen in a certain sum conditioned for the performance of the duty imposed on him; and in case of his making default, that sum accordingly becomes forfeited, and payable to Her Majesty. The commonest case of a recognizance between subject and subject was that of bail; which has, however, become much less frequent since the Act restraining the right to arrest on mesne process (*f*). It may be added that statutes and recognizances no longer affect lands, unless registered under stat. 2 & 3 Vict. c. 11, s. 8, and the lands themselves have been actually delivered in execution (*g*).

The peculiar incidents of contracts of record are:—First, that like all records, they prove themselves; that is, their bare production, without any further proof, is sufficient evidence of their existence, should it be controverted.

Secondly, that, if it become necessary to enforce them,

(*f*) 1 & 2 Vict. c. 110.

(*g*) See 27 & 28 Vict. c. 112, s. 1.

authorized, although not technically a recognizance, is good as a bond at common law: *Dennard v. State*, 2 Ga. 137; *contra*, *Sargent v. State*, 16 Ohio 267. The mere fact that proceedings are erroneous, will not avoid a recognizance given in the course of them: *Com. v. Haffey*, 6 Pa. St. 348. A recognizance need not recite the special facts which gave the officer an authority to act in the particular case in which it was taken. It is enough if he had jurisdiction in cases of that general description; and it appears that the condition is to do something to which a party may legally be bound by recognizance: *People v. Kane*, 4 Denio, 530; *The People v. Millis*, 5 Barb. 511; *Gildersleeve v. The People*, 10 Ib. 35. The record is not the forfeiture of a recognizance, but only evidence of it; and neglect of the clerk to omit to record the forfeiture when it is decreed, cannot affect it. It may be entered *nunc pro tunc*, and the record, when so amended, is conclusive in a collateral proceeding: *Rhoads v. The Com.*, 15 Pa. St. 272. A recognizance taken in open court is of itself evidence that it was taken by the order of the court without any formal entry to that effect: *Chumasero v. People*, 18 Ill. 405. A recognizance is a common law obligation and the sureties may be bound separately from their principal: *People v. Dennis*, 4 Mich. 609. A recognizance being a record cannot be averred against: *People v. Watkins*, 19 Ill. 120.—s.

that may be done, if it be thought proper, by writ of scire facias (*h*),—a writ which lies on a record only, and cannot be made use of for the purpose of enforcing any other description of contract.¹

An obligation by record, however, may be *dis-
charged by a deed of release, though a deed is a [*5]
matter of inferior degree (*i*).

However, as I said, the other two classes of contracts are those which are of most practical importance, and to them, therefore, my observations will be addressed. These, as I have said, are—

1. CONTRACTS BY DEED.

2. CONTRACTS WITHOUT DEED, OR SIMPLE CONTRACTS.

1. With regard to contracts by deed:

A deed is a written instrument, sealed and delivered (j).

Let us pause for a few moments to consider the parts of this definition.

In the first place, it is a written instrument, and this writing, the old books say, must be on paper or parchment; for if it were written on linen, wood, or other substance, it would not be a deed (*k*). But, though every deed must be written (*l*), it is not necessary that every such instrument should be *signed*, for, at Common Law, signature was not essential (*m*); and, although by several statutes, particularly the Statute of Frauds (*n*), *signature* has been rendered essential to the validity of

(*h*) Still, it seems, regulated by 15 & 16 Vict. c. 76, s. 132; see 38 & 39 Vict. c. 77, s. 21.

(*i*) *Barker v. St. Quintin*, 12 M. & W. 441; *Shepp. Touch.* 322.

(*j*) Co. Litt. 171 b; *Shepp. Touch.* 50. See *Hibblewhite v. M'Morine*, 6 M. & W. 200.

(*k*) Co. Litt. 35 b.

(*l*) *Shepp. Touch.* 54.

(*m*) Ib. 56.

(*n*) 29 Car. II, c. 3.

¹ By statute in Pennsylvania, and perhaps in some other States, scire facias is the method of proceeding to foreclose a mortgage: *Bouvier's Law Dict. sub voce*; *Bispham's Equity*, 3d ed., § 156.

[*6] certain specified contracts, yet *there are many contracts which are not affected by any statute; and to these last-mentioned contracts, and also to those which are the subject of several sections of the Statute of Frauds (o), *if entered into by deed*, signature is not necessary (p).¹

Secondly, it must be *sealed and delivered*. This is

(o) See Shepp. Touch. by Preston, 56; Cooch v. Goodman, 2 Q. B. (42 E. C. L. R.) 580; Aveline v. Whisson, 4 M. & Gr. (43 E. C. L. R.) 801; Cherry v. Heming, 4 Exch. 631. See 2 Blackst. Comm. 305.

(p) Bac. Abr. *Obligation*, C.

¹ Maule v. Weaver, 7 Pa. St. 332; Jeffery v. Underwood, 1 Ark. 108. But see Armstrong v. Stovall, 26 Miss. 275.—s.

What was said in these cases as to the *necessity* of signature is mere *dictum*, as an examination of them will show. But in the very recent case of Miller v. Ruble, 15 W. N. C. 431, the Supreme Court of Pennsylvania had to pass definitely upon the question. A statute provides that when a conveyance is to be made of the real estate of a married woman, husband and wife shall join and "it shall be lawful for them to make, seal, deliver, and execute a deed for the same, and after such execution" to appear before a proper officer and acknowledge the same. In that case the deed recited six grantors, of whom two were a husband and his wife in right of the wife. After the attesting clause were six scroll seals, opposite one of which the wife signed. The husband did not sign, but both appeared before a justice of the peace and duly acknowledged the instrument. The court held that the interest of the wife did not pass to the grantee. In the opinion Chief Justice Mercur says: "The great industry and careful search of counsel have not resulted in his being able to cite a case since McDill v. McDill (1 Dallas, 64), in which it was held by this court on a direct presentation of the question that a deed professing to convey land was sufficiently executed without any signature of the vendor. On the contrary, in Watson v. Jones (4 Norris, 117), McDill v. McDill is cited approvingly by Mr. Justice Gordon. The recognition of any rule which dispenses with the necessity of the signature of the grantor would be fraught with great mischief. Aided by a pliant justice of the peace, or by a false personation before an honest one, it would provide a convenient way to rob a man of his land without the trouble and danger of counterfeiting his signature. . . . Sealing and delivery are not the only requisites which must precede the acknowledgment. They must first *make* the deed. This clearly imports the signing thereof. Until that is done it would be a forced construction of this language to say they had made a deed. The manifest meaning of this word in the connection in which it is used, is that the deed shall be duly prepared and be signed by them. The sealing is referred to as a separate act." The entire opinion should be read. In Washburne on Real Property (4th ed.) *553, it is stated that "In most of the States, however, a signature is required; and, in all, it is uniformly practised."

the main distinction between a *deed* and any other contract. The seal is an indispensable part of every deed,¹ and so, except in case of the deed of a corporation (*q*), is the delivery (*r*). From this delivery it is a perfect deed, taking its effect from this essential part of its completion (*s*). It obviously follows immediately from this proposition that after delivery it cannot be altered—not even by filling up a blank (*t*).² With regard to delivery, however, you must observe that it is not absolutely

(*q*) Case of Dean and Chap. of Fernes, Dav. Rep. 116; Derby Canal Co. v. Wilmont, 9 East, 360.

(*r*) Shepp. Touch. 57.

(*s*) Goddard's Case, 2 Rep. 4 b.

(*t*) Weeks v. Maillardet, 14 East, 568; Hibblewhite v. M'Morine, 6 M. & W. 200.

¹The policy of the common law as to the use and nature of a seal, was very fully discussed by Kent, C. J., in *Warren v. Lynch*, 5 Johns. 244, where the Court refused to recognize a scrawl or scroll made by the pen as a seal, and held that a seal must be composed of wax or some tenacious substance. By statute in that State, however (Stat. of 7 April, 1848, c. 197), the impression of the seal upon the paper is sufficient in the case of a corporation, and the statutes of Maine, Vermont, New Hampshire, and Massachusetts, give validity to such impressions in the case of legal processes and official documents. With this exception, all the New England States adhere to the common law requisitions of a seal. In New Jersey, a scroll with the pen is a sufficient seal on any instrument for the payment of money. (Rev. Stat. 1846.) By the common law of Pennsylvania, Delaware, North and South Carolina, and Mississippi, such a scroll has always been recognized as a sufficient seal, and in most, if not all the other States, it is believed that the law has been so settled by statute. [See title "Scroll" in Rawle's Bouvier's Law Dictionary.]—R.

See *Roberts v. Pillow*, 1 Hempst. 624. The fact that a writing contains the words "sealed with my seal," when there is no seal or scroll attached, will not make it a sealed instrument: *Chilton v. People*, 66 Ill. 501.—s.

²This rule must be understood, however, to apply to *material* alterations or additions: *Pigot's Case*, 11 Coke 26 b; *Waugh v. Bussell*, 5 Taunt. (1 E. C. L. R.) 707; *Wood v. Slack*, L. R. 3 Q. B. 379; *Suffell v. Bank*, 7 Q. B. D. 270; *Hale v. Russ*, 1 Greenl. 334; *Knapp v. Maltby*, 13 Wend. 587; *Marshall v. Gougler*, 10 S. & R. 164.

In *Master v. Miller*, 1 Anstr. 228, Wilson, J., is reported as saying: "I remember the case of *Texira v. Evans*, before Lord Mansfield, which was this: Evans wanted to borrow 400*l.* or so much of it as his credit should be able to raise; for this purpose he executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bond; Texira lent 200*l.* on it, and

necessary that the party executing should take the instrument into his hand and give it to the person for whose benefit it is intended (*u*); but as it is said by

(*u*) See *Goodright v. Strapham*, Cowp. 204, and *Bac. Abr. Obligation, C.*

the agent accordingly filled up the blanks with that sum and Texira's name, and delivered the bond to him. On *non est factum* pleaded, Lord Mansfield held it a good deed." This statement of the case of *Texira v. Evans* seems to have been accepted as law in England (or at any rate in many of the United States) for many years, but in 1840 it was overruled in *Hibblewhite v. M'Morino*, 6 M. & W. 200, which may now be considered as settled law: *Swan v. North British, &c., Co.*, 2 H. & C. 175. These are both instances of the most important class of cases in which the question arises, viz.: those in which powers of attorney to transfer shares of stock have been given with blanks for the name of the transferee. These cases determine that such instruments are void and are not validated by being filled up by a party other than the maker, unless such person is authorized to supply them by an instrument under seal. The practice of the Stock Exchange to deliver stock in this way, the names to be inserted by the purchasing broker, was not allowed to prevail against this rule: *Taylor v. Great Indian, &c., R'way*, 4 De G. & J. 559. In these cases, however, the act establishing the company, or the articles of association under which it operated, required that the transfer of shares should be by deed. In a later case where the articles of association provided that the transfer of shares should be by an "instrument in writing" it was held that blank "transfers" could be filled up by an authorized agent and would then be valid, though void as deeds, and though the uniform practice of the company was to require a deed of transfer. It does not appear whether these transfers purported to be sealed or not: *Ex parte Sargent*, L. R. 17 Eq. 273; *Prance v. Clark*, 22 Ch. Div. 830. The American decisions are conflicting, a majority of the States adhering to the strict rule, but a considerable minority qualifying it, or rejecting it altogether; see the cases collected in a note to *Preston v. Hull*, 12 Am. L. Reg. 699. As to transfers of shares of stock, the custom is for the assignor to fill up a power of attorney under seal, to execute a transfer on the books of the company (usually printed on the back of the certificate) with the name of the assignee left blank, and the certificate thus indorsed may be passed from hand to hand, and the last holder will be entitled to fill up the assignment with his own name, and complete the transfer on the books of the company: *Biddle*, Law of Stockbrokers, 268 *et seq.*; *Morawetz*, Private Corporations, §§ 328 *et seq.* and cases cited. In *Worrall v. Munn*, 5 N. Y. 239, it is said that the strictness of the Common Law has been relaxed and that the present doctrine may be thus stated: "If a conveyance or any act is required to be by deed, the authority of the attorney or agent to execute it must be conferred by deed; but if the instrument or act would be effectual without a seal, the addition of a seal will not render an authority under seal necessary, and if executed under a parol authority or subsequently ratified or adopted by parol, the instrument or act will be valid and binding on the principal." See *Kneedler's Appeal*, 92 Pa. St. 428.

Lord Coke (x): "*a deed may be delivered by words without actual touch, or by touch without *words.*" "The delivery," his Lordship says, "is sufficient without [*7] any words; for, otherwise, a man who is mute could not deliver a deed And, as a deed may be delivered to the party without *words*, so may a deed be delivered by *words* without any *act* of delivery; as, if the writing sealed lieth on the table, and the feoffor or obligor saith to the feoffee or obligee, 'Go, and take up the writing, it is sufficient for you, *or* it will serve the turn, *or* take it as my deed,' or the like words, it is a sufficient delivery" (y). However, in practice it is always safest and most advisable to follow the ordinary and regular course, which is, to cause the person who is to deliver the deed to place his finger on the seal, thereby acknowledging the seal to be his seal, and state that he delivers the instrument as his act and deed.¹

(x) Co. Litt. 36 a.

(y) See further Doe d. Lloyd v. Bennett, 8 Car. & P. 124; Tupper v. Foulkes, 30 L. J. (C. P.) 214.

¹ While delivery is essential to the legality of a deed, it may be either actual or verbal; it is sufficient if there be an intention or assent of the mind on the part of the grantor to treat the deed as his: Stewart v. Redditt, 3 Md. 67; McLure v. Colclough, 17 Ala. 89. The possession of the deed by a party claiming under the grantee is evidence of delivery to such grantee until the contrary is shown: Stewart v. Redditt, 3 Md. 67; McMorris v. Crawford, 15 Ala. 271; Rushin v. Shields, 11 Ga. 636; Dawson v. Hall, 2 Mich. 390; Berry v. Anderson, 22 Ind. 36; Rhine v. Robinson, 27 Pa. St. 30; Firemen's Ins. Co. v. McMillan, 29 Ala. 147; Sadler v. Anderson, 17 Tex. 245; Little v. Gibson, 39 N. H. 505; Morris v. Henderson, 37 Miss. 492; Black v. Shreve, 13 N. J. Eq. 455; Black v. Thornton, 30 Ga. 361, 31 Ib. 641; Benson v. Woolverton, 15 N. J. Eq. 158; Tuttle v. Turner, 28 Tex. 759; Newlin v. Beard, 6 W. Va. 110; Billings v. Stark, 15 Fla. 297; Goodwin v. Ward, 6 Baxt. (Tenn.) 107; Roberts v. Swearingen, 8 Neb. 363; Stewart v. Stewart, 50 Wis. 445. The acknowledgment and recording of a deed are sufficient to warrant the presumption of a legal delivery, and as the clerk, after he has recorded it, is bound to return it to the grantee, the possession of it by him will be regarded as the possession of the grantee: Stewart v. Redditt, 3 Md. 67. See Critchfield v. Critchfield, 24 Pa. St. 100; Black v. Hoyt, 33 Ohio St. 203. The recording of a deed by the grantor under circumstances which create no suspicion of fraud, may be considered evidence of delivery:

It is not necessary that the delivery should be to the person who is to take the benefit of the deed. The judgment in the case of Doe d. Garnons *v.* Knight (z), which was delivered by *Sir John Bayley* after a *curia advisari vult*, is worthy of a most careful perusal; the learning relating to this subject will be found there clearly collected and discussed. The inference [8*] which the Court, of which his *Lordship was the

(z) 5 B. & C. (11 E. C. L. R.) 671. See *Botcherby v. Lancaster*, 1 A. & E. (28 E. C. L. R.) 77; *Doe d. Richards v. Lewis*, 20 L. J. (C. P.) 177; *Fletcher v. Fletcher*, 4 Hare, 67.

Buckley v. Buffington, 5 McLean, 457. It is at most, however, *prima facie* evidence of delivery: *Welborn v. Weaver*, 17 Ga. 267; *Rowell v. Hayden*, 40 Me. 582; *Berkshire Ins. Co. v. Sturgis*, 13 Gray, 177; *Boardman v. Dean*, 34 Pa. St. 252; *Somers v. Pumphrey*, 24 Ind. 231; *Jackson v. Cleveland*, 15 Mich. 94; *Robinson v. Gould*, 26 Iowa, 89; *Kerr v. Birnie*, 25 Ark. 225; [which may be rebutted: *Knolls v. Barnhart*, 71 N. Y. 474; *Watson v. Ryan*, 3 Tenn. Ch. 40; *Union Ins. Co. v. Campbell*, 95 Ill. 267.] From the fact of signing, the jury may presume the *sealing* and delivery, although there be no reference to sealing in the body of the writing, if there be a seal affixed to the name: *Miller v. Binder*, 28 Pa. St. 489. The delivery of a deed to the recorder for the grantees is sufficient, if the grantees had agreed to accept: *Hoffman v. Mackall*, 5 Ohio St. 125; *Boody v. Davis*, 20 N. H. 140; *Molineaux v. Coburn*, 6 Gray, 124; *Bensley v. Atwill*, 12 Cal. 231; *Balbec v. Donaldson*, 2 Grant, 459; *Masterson v. Cheek*, 23 Ill. 72; *Prettyman v. Goodrich*, 23 Ill. 330; *Houfes v. Schultze*, 2 Ill. App. 196; *Young v. Stearns*, 3 Ib. 498; *Sharp v. Jarrell*, 66 Ind. 52; *Elsberry v. Boykin*, 65 Ala. 336; *Moore v. Giles*, 49 Conn. 570; *Metcalf v. Brandon*, 60 Miss. 685. When a deed was executed, handed to the register, and recorded without the knowledge or assent of the grantees, after which the grantor took and kept possession of it, it was held that in the absence of evidence that he intended this to constitute a delivery, it was not his deed: *Hayes v. Davis*, 18 N. H. 600. [See *Knolls v. Barnhart*, 71 N. Y. 474.]—s.

A deed executed and acknowledged by a commissioner appointed by a decree to sell and convey land in partition proceedings is delivered when the Court confirms his report of sale and conveyance, although he retains manual possession of it: *Cocks v. Simmons*, 57 Miss. 183. The intent of the grantor and grantee that what was done should operate as a delivery and acceptance of the deed, may be implied from subsequent admissions, conduct, and circumstances, even where the instrument remains in the hands of the grantor: *Nichol v. Davidson County*, 3 Tenn. Ch. 547; *Snow v. Orleans*, 126 Mass. 453; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Dukes v. Spangler*, 35 Ohio St. 119; *Thatcher v. St. Andrew's Church*, 37 Mich. 264. The effect of a delivery is not destroyed by a subsequent redelivery to the grantor: *Otis v. Spencer*, 102 Ill. 622; *Rogers v. Rogers*, 53 Wis. 36.

organ, there drew from all the authorities on the subject was, first, "that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, that it is a valid and effectual deed; and that delivery to the party who is to take by it, or any other person for his use is not essential;" secondly, "that delivery to a third person for the use of the party in whose favour a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery."¹

¹ As early as the year 1809, the case of *Belden v. Carter*, 4 Day, 66, was similarly decided in Connecticut upon much the same facts as in *Doe v. Knight*, and in 1814, twelve years before the decision of that case (which is also reported in 8 D & R. 348, and see *Exton v. Scott*, 6 Sim. 31), the same conclusions had been arrived at, upon a review of nearly the same authorities, in the case of *Souverbye v. Arden*, 1 John. Ch. 240, decided by Mr. Chancellor Kent, where the grantor of a voluntary deed having sworn in his answer to a bill filed by the grantees, "that he believed that he and his wife sealed the deed in the presence of two witnesses, and that they may have used the formal words of delivery," it was held that neither the subsequent retention of the possession of the deed by the grantor, nor his subsequent declaration contrary to its tenor, could destroy its efficacy: *Young v. Moore*, 1 Strobhart, 55; and it is well settled that if the deed *has ever been* once actually delivered, the retention or the parting with its possession is an immaterial fact: *Sorugham v. Wood*, 15 Wend. 545; *Jackson v. Dunlap*, 1 Johns. Cas. 114; *Brinckeroff v. Lawrence*, 2 Sand. Ch. 406; *Roosevelt v. Carrow*, 6 Barb. 190; *Jones v. Jones*, 6 Conn. 111; *Den v. Farlee*, 21 N. J. L. 280; *Blight v. Schenck*, 10 Pa. St. 285; *Farrar v. Bridges*, 5 Humph. 411.

But upon the question whether there *has ever been* a delivery, the possession of the instrument may have a material bearing. Delivery is, to a certain extent, a question for the jury, but under the direction of the Court; to what extent may be well exemplified by the case of *Doe v. Knight*, which was an ejectment upon a mortgage. Wynne, an attorney, who had been in his lifetime the owner of the premises in question, had received a large sum for his client Garnons, and sent word to him that he had misapplied £10,000 of it, but that he would make him secure. Some years after Wynne wrote with his own hand a mortgage of all his property to Garnons to secure £10,000, brought it into the presence of his niece, signed and sealed it, said, "I deliver this as my act and deed," and then took it away. In the same month he delivered a parcel to his sister, saying, "Take this, it belongs to Mr. Garnons." Some days after, he asked for and took away the parcel, and in a few

Before quitting the subject of delivery, it is right to explain the distinction between a deed, ordinarily so

days returned it, somewhat reduced in bulk, saying, "Here, put this by." Some months after this, Wynne died, having first executed a second mortgage of all his property to another person. The parcel was found to contain the mortgage which the niece had witnessed, which was to secure £10,000, together with a statement of the account between Garnons and himself, showing an indebtedness of that amount. The jury were told that if the delivery to the sister was, under the circumstances, a parting with the possession of the deed, and of the power and control over it for the benefit of Garnons, and to be delivered to him either in Wynne's lifetime, or after his death, they should find for the plaintiff, but that if it was merely delivered to her for safe custody as the depository, and was subject to his future control and disposition, they should find for the defendant. The jury having found for the plaintiff, Sir John Bayley, in delivering the opinion of the Court refusing a new trial, adverting to the objection that the conclusion which the jury drew, viz.: that the sister held the mortgage free from the control of her brother, had no premises to support it, answered it by saying that although the sister did return it, yet she would have been justified had she refused. (See to the same effect as to the depository being a trustee for the grantee: *Belden v. Carter*, 4 Day, 66.) Two questions, therefore, arose; first, whether when a deed is duly executed and formally delivered with appropriate words, but retained by the party executing it, that retention will obstruct the operation of the deed, which question was answered in the negative; and secondly, whether if delivery for such party be essential, a delivery to a third person will be sufficient, if such delivery puts the instrument out of the power and control of the party who executed it, though such third person does not pass the deed to the party benefited until after the death of the grantor. This question was answered in the affirmative; and both of these propositions are perfectly settled law on both sides of the Atlantic: *Belden v. Carter*, 4 Day, 66; *Johnson v. Ruggles*, 13 Johns. 288; *Brown v. Brown*, 1 W. & M. 325; *Bryan v. Wash*, 2 Gil. 557; *Merrills v. Swift*, 18 Conn. 257; and see many cases collected in the opinion of the Court in *Hulick v. Scovil*, 4 Gil. 159.

The grantor's placing the deed upon record—his putting it in the post-office directed to the grantee—his bringing an action for the consideration-money—the grantee's having possession of the deed—or of the premises consistently with the tenor of the deed—constitutes *prima facie* evidence, upon which the jury may presume that the deed was delivered: *Porter v. Cole*, 4 Me. 25; *Ward v. Lewis*, 4 Pick. 520; *Mills v. Gore*, 20 Ib. 28; *Games v. Stiles*, 14 Pet. 322; *Collins v. Parker*, 1 Strobb. 25; *Houston v. Staunton*, 11 Ala. 412; *M'Kinney v. Rhoads*, 5 Watts, 343; *Rigler v. Cloud*, 14 Pa. St. 364; *Blight v. Schenck*, 10 Ib. 285; *Gardner v. Collins*, 3 Mason, 401. So, where a deed was left in the hands of the magistrate before whom it was acknowledged, and was afterwards taken away by the brother of the grantee for him, this was held sufficient evidence to go to the jury, from which they might presume delivery: *Arrison v. Harmstead*, 2 Pa. St. 191; while, on the other hand, if the deed were put into the post-office, directed not to the grantee nor his

termed, and an *escrow* (a). An escrow is a deed delivered conditionally to a third person, to be delivered to

(a) Shepp. Touch. 58.

agent, but to an agent of the grantor, it would be error to leave the question of delivery to the jury, as there would be no evidence from which delivery could be presumed: *Elsey v. Metcalf*, 1 Denio, 323; *White v. Baily*, 14 Conn. 271. So, where there were neither acts done nor words spoken from which a delivery could be inferred, and the possession of the deed by the party seeking to take advantage of it was accounted for by his having taken possession of all the papers of the grantor after his death, it was held error to leave the question of delivery to the jury: *Clayton v. Liverman*, 4 Dev. & Bat. 238.

It was suggested by the English editor that the qualifications adopted in *Doe v. Knight* had been overlooked by the more recent authorities, and that the doctrine of that case has been of late more broadly laid down. But it is believed that they do not either narrow or enlarge the rules adopted in that case, being (with but one exception, *Grudgeon v. Gerrard*) cases of voluntary settlements in favor of near relatives, or the like, sought to be enforced in equity, as to which, it has been repeatedly held, that Courts will go farther in the presumption of a delivery than in ordinary cases of conveyance: *Bryan v. Wash*, 2 Gilm. 557; *Brown v. Brown*, 1 W. & M. 325; *Souverbye v. Arden*, &c. In *Fletcher v. Fletcher*, 4 Hare, 67, cited by him, a testator executed a voluntary covenant with trustees, that in case his two natural sons should survive him, his executor should pay to the trustees £60,000 for such of the sons as should be living at the time of his death. This instrument, which purported to be regularly executed, was found among the testator's papers some years after his death, and upon a bill filed by the surviving son to have the covenant enforced, the stress of the argument was laid upon the deed being voluntary, executory, and testamentary, and as such revoked by the subsequent will; and Vice-Chancellor Wigram, after answering these objections, said, "The only other question arises from the circumstances of the instrument having been kept in the possession of the party; does that affect its legal validity? In the case of *Dillon v. Coppin*, 4 Myl. & Cr. 660, I had occasion to consider that subject, and I took pains to collect the cases upon it. The case of *Doe v. Knight* shows, that if an instrument is sealed and delivered, the retainer of it by the party in his possession does not prevent it from taking effect. No doubt the intention of the parties is often disappointed by holding them to be bound by deeds which they have kept back, but such unquestionably is the law." The cases thus referred to were *Barlow v. Heneage*, Prec. Ch. 211; *Lady Hudson's Case*, Ib. 235; *Clavering v. Clavering*, 2 Vernon, 473, Dom. Proc., 1 Bro. P. C. 122; *Broughton v. Broughton*, 1 Atkyns, 625; *Doe v. Knight*, *Sear v. Ashwell*, 3 Swans. 411; *Worrall v. Jacob*, 3 Meriv. 256; and *Exton v. Scott*, 6 Sim. 31; the first four of which were all cited and reviewed in *Doe v. Knight*, and the language used in that case by Sir John Bayley, and quoted *supra*, was cited by Mr. Wigram at length.

In looking at the cases in equity upon this head, much will be found to turn upon the nature of the instrument, and the purpose for which it was intended: *Bryan v. Wash*, 2 Gilm. 557; *Souverbye v. Arden*, &c. Thus, in

the person for whose benefit it purports to be, on some condition or other. If that condition be performed, it

Ward v. Lamb, Prec. Ch. 182, the Court refused to decree the giving up of a voluntary bond made to a daughter, to protect the obligor from taxation, and retained by him; and in *Cecil v. Butcher*, 2 Jac. & W. 573, the Court refused to enforce a conveyance made (and retained) by a father in favor of a son in order to give him a qualification to kill game, and the Master of the Rolls, after viewing the authorities, said, "They have not depended solely upon the question whether the party has made a voluntary deed; not merely upon whether having made it, he keeps it in his own possession; not merely upon whether it is made for a particular purpose; but when all these circumstances are connected together, when it is voluntary, when it is made for a purpose that has never been completed, and when it has never been parted with, then the courts of equity have been in the habit of considering it as an imperfect instrument." *Ward v. Ward*, 2 Hayw. 226; *Jackson v. Inabnit*, 2 Hill Ch. 411; *Kirk v. Turner*, 1 Dev. Ch. 14.

The acceptance by the grantee of a deed is as essential to its validity as its delivery by the grantor. It rests, however, upon much stronger presumption where the deed purports to confer a benefit, and an actual acceptance need not then be shown in the first instance, either by the grantee himself, or any one beneficially interested under it: *Butler and Baker's Case*, 3 Co. 26 b; *Thompson v. Leach*, 2 Vent. 202; *Hatch v. Hatch*, 9 Mass. 307; *Belden v. Carter*, 4 Day, 66; *Church v. Gilman*, 15 Wend. 656; *Reed v. Marble*, 10 Paige, 409; *Tate v. Tate*, 1 Dev. & Bat. (Eq.) 22; *Halsey v. Whitney*, 4 Mason, 206. The presumption is, of course, however, liable to be rebutted, and it will be nearly, if not quite, overthrown in cases where the acceptance of the deed confers no benefit, or inflicts a positive harm upon the other party: *Jackson v. Bodle*, 20 Johns. 184; *Camp v. Camp*, 5 Conn. 300; *Renfro v. Harrison*, 10 Mo. 411.

How far the relation back of the subsequent acceptance to the original delivery will affect the attaching of intermediate interests, is a question of some practical importance. In *Wilt v. Franklin*, 1 Binn. 502, the rights arising under an execution levied between the period of delivery of an assignment for creditors, and assent by the grantee—a space of four days,—were postponed to those arising under the deed: *Merrills v. Swift*, 18 Conn. 257, was very similar to *Doe v. Knight*. A debtor being in failing circumstances executed a mortgage, and delivered it to one for the use of the mortgagee. The mortgage was immediately recorded, and, some time after, was assented to by the mortgagee, and it was held to be entitled to a preference over an intermediate attachment. In *Harrison v. The Trustees of Phillips' Academy*, 12 Mass. 455, where an embarrassed debtor made a conveyance to his sureties by way of precautionary indemnity, of which they were ignorant till a month afterward, when it was assented to by them, it was said by Parker, C. J., that creditors might have arrested the transaction by an execution levied in the intermediate time; but there was a question of fraud in the case, evidence of which would, it is conceived, always invalidate such a transaction; and the remarks on *Wilt v. Franklin* in *M'Kinney v. Rhoads*, 5 Watts, 343, were directed to the want of

becomes an absolute deed; till then it continues an escrow, and, if the condition never be performed, it never becomes a deed at all. Thus, at a meeting for

delivery in that case, apart from which, it is said, that the decision is perfectly correct. Where, moreover, a deed is delivered as an *escrow*, although, as is stated in the text, it relates back to the time of the original delivery: *Foster v. Mansfield*, 3 Met. 412; *Ruggles v. Lawson*, 13 Johns. 285; yet it must be borne in mind that this is for certain purposes only—that this fiction is resorted to in cases of necessity, to prevent injury and uphold the deed; as, for instance, where a feme sole delivers a deed as an escrow, and marries before the condition is performed, it is her deed from the first delivery, as otherwise her marriage would defeat it: *Perkins*, 139–140; “for in such case from necessity, and *ut res magis valeat quam pereat*, to this intent by fiction of law, it shall be a deed *ab initio*, and yet in truth it was not her deed until the second delivery:” *Butler and Baker’s case*, 3 Co. 36 a. Hence, in accordance with the maxim, *in fictione juris semper equitas existat*, such relation back will not operate to defeat the rights of third persons attaching in the interval: *Frost v. Beekman*, 1 Johns. Ch. 288; *Green v. Putnam*, 1 Barb. 504; *Lewis v. Taylor*, Ril. Ch. 179; *Carr v. Hoxie*, 5 Mason, 60; *Merrills v. Swift*, *supra*; and thus in *Jackson v. Rowland*, 6 Wend. 666, where a deed was delivered as an escrow, and previously to its subsequent absolute delivery a judgment was obtained against the grantor, under which the land was sold, it was held that the purchaser under this judgment took a good title to the land; and so in *Shirley’s Lessee v. Ayres*, 14 Ohio, 307.

Where a deed is *rejected* by the grantee, the title reverts in the grantor, provided the dissent be made by the party really in interest. Thus, where a conveyance was to A. to the use of B., A.’s dissent was not allowed to defeat the use limited to B.: *Gorton’s case*, 2 Roll. Ab. 789, pl. 7. In these cases of rejection the question also arises as to intermediate interests and estates created by the deed. In *Thompson v. Leach*, 2 Ventr. 198, it was finally held in the House of Lords, reversing the judgments below, that a deed of surrender by tenant for life to a remainderman, barred intermediate contingent remainders, though the grantee rejected the deed when he knew of it; and in *Read v. Robinson*, 6 W. & S. 329, a debtor executed a general assignment for the benefit of his creditors, and delivered it to one of his sons, with instructions to take it to one Ward, who had been making out his father’s accounts. Ward took the deed to the assignee, who refused to receive it, and said he would have nothing to do with it. An assignee was then appointed by the Court, who brought trover against the executor of the grantor’s will, executed after the assignment. The Court below ordered a nonsuit, on the ground of the refusal of the assignee; but this judgment was reversed by the Supreme Court, which held, that although by the rejection the title might have been remitted to the grantor in case the grantee were the party beneficially-interested, yet that the instrument being a trust for creditors, the latter were the parties in interest, and that by the transmission of the deed for acceptance to the assignee, the title instantly passed at law, and it could not be divested by the subsequent disagree-

executing a composition deed for performance of which the defendant was to be surety, it was signed and sealed by him; but it had been previously agreed that the deed should not be operative unless all the creditors [*9] sealed it, and it was then delivered *to one of the creditors, in order that he might get it executed by the others. This he failed to effect, and in an action against the defendant the deed was held to be a mere escrow (*b*). And even where a subscribing witness to a bond stated that it was attested, sealed, and delivered in the usual way, no other words than those which are usual on the execution of a bond being used by the defendant when he executed the instrument, but that before and at the time of the execution it was agreed that it should remain in his (the subscribing witness's) hands, until the death of Lord Stair, and until certain promissory notes were given up, and that the bond was placed in his hands upon that condition, the Court held that it was a question of fact upon the whole evidence whether the bond was delivered as a deed to take effect from the moment of delivery, or whether it was delivered upon condition that it was not to operate as a deed until the death of Lord Stair, and until the

(*b*) *Johnson v. Baker*, 4 B. & Ald. (6 E. C. L. R.) 440.

ment by the assignee; thus showing, as was said by the Chief Justice, in speaking of *Thompson v. Leach*, "that intermediate interests may fasten on the title, which it is not in the power of the grantee's disagreement to unclasp."

It has been suggested by Professor Greenleaf, in his edition of *Cruise on Real Property* (tit. xxxii, ch. 1, § 25, note), that *Thompson v. Leach* was not the case of the grant of an estate from the absolute owner to a stranger who had no previous interest in it, but it was the annihilation of a particular estate in favor of a person to whom, on the termination of that estate, at that time by what mode soever, the whole property would belong by its original limitation, and that the case of *Read v. Robinson* was rather decided upon a local statute, authorizing the Court, in case of renunciation or refusal of a trustee, to appoint a new one in his place. The Court did not, however, rest its decision wholly on that ground.—R.

notes were delivered up (*c*). At a new trial of the case, the Lord Chief Justice, Lord *Tenterden*, told the jury that if the instrument was delivered as the deed of the defendant binding on him *at the time*, although it was delivered on the faith and confidence which he reposed in the attesting witness (who was his *attorney), [*10] that he would not part with it until the death of Lord Stair, and until the notes were delivered up, it immediately became the defendant's deed. And although the witness in fact parted with it before Lord Stair's death, and before the delivery up of the notes, in violation of the trust reposed in him, it was still the defendant's deed. But if the delivery itself *at the time* was conditional, so as not to constitute any present obligation, it was an escrow or writing merely, and not a deed, and the condition of the delivery having been broken it had never become the deed of the defendant. But in order to make the delivery conditional, it was not necessary that any express words should be used at the time; the conclusion was to be drawn from all the circumstances. It obviated all question as to the intention of the party, if at the time of delivery he expressly declared that he delivered it as an escrow; but *that was not essential* to make it an escrow. And, therefore, where a deed executed by one party is sent to the agent of the other in a letter explaining that it is executed only on condition of a counterpart being executed by the latter, such evidence has been considered sufficient to show that it was sent only as an escrow to take effect after execution of the counterpart (*d*).

(*c*) *Murray v. E. of Stair*, 2 B. & C. (9 E. C. L. R.) 82; *Xenos v. Wickham*, 33 L. J. (C. P.) 13, (Ex Ch.); 13 C. B. N. S. (106 E. C. L. R.) 435; L. R. 2 H. L. 296; 36 L. J. (C. P.) 313.

(*d*) *Furness v. Meek*, 27 L. J. (Ex.) 34. See *Millership v. Brookes*, 5 H. & N. 797; 29 L. J. (Ex.) 369.

This conditional delivery must be to some third [*11] *person ; for, if it were to the party himself who is to be benefited the deed would become absolute, though the party delivering were to say in express terms that he intended it to be conditional only ; for it is impossible by words to get rid of the legal operation of the delivery (*e*) ; and, therefore, where the defendant in debt on a bond endeavoured to set up a delivery as an escrow to the obligee himself, the Court thought that the plea was so clearly bad, that they would not hear any argument upon the subject. But the delivery to the solicitor of the grantee of an instrument executed by the grantor, will not convert the instrument from an escrow into a deed, provided the delivery is of a character negating its being a delivery to the grantee (*f*). Although, however, where the deed is delivered to a third person as an escrow, the delivery is, as I said, conditional ; yet when the condition has been performed, it becomes absolute and takes effect ; not from the date of performing the condition, but from the date of the original delivery ; so much so, that it has been held, that where a bond was delivered upon condition, and the obligor and obligee were both dead before the condition was performed, yet, on that event happening, it became the deed of the deceased obligor, so as to create a charge upon his assets as against his representatives (*g*).

[*12] *It is therefore clear that in order to make a writing sealed and delivered an escrow merely, it is not necessary that express words should be used. You are to look at all the facts attending the execution, and to all that took place at the time, and, therefore, although it be in form an absolute delivery, if it can

(*e*) *Holford v. Parker*, Hob. 246 ; and Co. Litt. 36 a.

(*f*) *Watkins v. Nash*, L. R. 20 Eq. 262 ; 44 L. J. (Ch.) 505.

(*g*) See *Graham v. Graham*, 1 Ves. jun. 272 ; *Froset v. Walsh*, Bridg. 51.

reasonably be inferred that the writing was not to take effect as a deed till a certain condition should be performed, it will operate as an escrow (*h.*)¹

(*h.*) *Bowker v. Burdekin*, 11 M. & W. 128; *Gudgen v. Besset*, 26 L. J. (Q. B.) 36; 6 E. & B. (88 E. C. L. R.) 986; See *Pym v. Campbell*, 25 L. J. (Q. B.) 277; 6 E. & B. (88 E. C. L. R.) 870; *Watkins v. Nash*, *supra*.

¹The point decided in *Bowker v. Burdekin* was, that a deed which was executed as an absolute conveyance, would not the less be an act of bankruptcy, because, on looking at the form of the deed, the conclusion might possibly be come to that the parties did not contemplate that the deed should operate as an act of bankruptcy unless the whole partnership effects were conveyed. The remark cited *supra* was said by Baron Parke to be the result of the cases of *Johnson v. Baker*, 4 B. & Al. (6 E. C. L. R.) 440; and *Murray v. The Earl of Stair*, 2 B. & C. (9 E. C. L. R.) 82, in both of which cases the instrument was not delivered to the party interested, but left with a stranger; and it must not be inferred, from the remark in *Bowker v. Burdekin*, that a deed purporting to be absolute, and delivered to a party, can by parol evidence be shown to have been conditional, as the contrary was expressly held in *Ward v. Lewis*, 4 Pick. 520, where an insolvent debtor having executed an assignment for the benefit of his creditors, which was found in the hands of the assignee it was held that the deed could not operate as an escrow, because the *prima facie* evidence was that it was delivered to the party, and that parol evidence was inadmissible to show that the assignment was meant to take effect only upon the assent of the majority of the creditors.—R.

A deed can never be delivered to the grantee himself as an escrow; if intended to operate as such, it must be delivered to a third person for him: *Jordan v. Pollock*, 14 Ga. 145; *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147; *Thomason v. Dill*, 30 Ala. 444; *Duncan v. Pope*, 47 Ga. 445. If delivered to the grantee, no matter what may be the form of the words accompanying the act, the delivery will be absolute: *Dawson v. Hall*, 2 Mich. 390; [*Williams v. Higgins*, 69 Ala. 517. This rule does not apply to deeds which upon their face import that something more is to be done besides delivery to make them competent and perfect contracts according to the intention of the parties: *Wendlinger v. Smith*, 75 Va. 309.] It is not admissible to show, by parol evidence, that a deed was delivered to the party, on any condition contrary to the terms of the instrument: *Worrall v. Munn*, 1 Seld. 239; *Warren v. Miller*, 38 Me. 108; *Black v. Shreve*, 13 N. J. Eq. 455; *Braman v. Bingham*, 26 N. Y. 483. [But the manual delivery of a deed will not be regarded as a full and complete delivery when it is mutually understood at the time between grantor and grantee that such deed is not to become operative until some future event: *Arthur v. Anderson*, 9 So. Car. 234; *Fraser v. Davie*, 11 Ib. 56.] An unconditional delivery of a deed to a third person for the use of the grantor, and the acceptance implied by bringing suit upon it, will constitute a sufficient delivery, and the acceptance may be presumed from the beneficial nature of the transaction: *Tibbals v. Jacobs*, 31 Conn. 428; *Guard v. Bradley*, 7 Ind. 600; *Wall v. Wall*, 30 Miss. 91; *Stewart v. Weed*, 11 Ind. 92; *Jones v. Swayze*,

Such, then, being the essentials of a deed—*writing*¹ on paper or parchment, *sealing*, and *delivery*—it is right to add, that, for the sake of convenience, deeds are divided into two classes, *Deeds Poll*, and *Indentures*, a Deed Poll being made by one party only, an Indenture between two or more parties (*i*). The names indeed of Deed Poll and Indenture were, as you probably all know, derived from the circumstance that the former

(*i*) Co. Litt. 35 b.; Shepp. Touch. 50. Williams, Real Property, p. 156, 14th ed.

42 N. J. L. 279; Campbell v. Kuhn, 45 Mich. 512. To make the delivery of a deed effectual the grantor must part with all control. He cannot reserve to himself the power of recalling it; if he does so, the delivery is ineffectual: Cook v. Brown, 34 N. H. 460; Brown v. Austen, 35 Barb. 341. Any act or words, by which a grantor indicates an intention to deliver a deed is *prima facie* a delivery: Mallett v. Page, 8 Ind. 364; Dearmond v. Dearmond, 10 Ib. 191; Stevens v. Hatch, 6 Minn. 64. If a bond intended as an escrow be delivered by the obligor to the obligee, on an agreement that the latter will hand it to a third person as depository, it will operate as an escrow: Brown v. Reynolds, 5 Sneed, 639. So the delivery of the deed to the grantee for examination is no delivery: Graves v. Dudley, 20 N. Y. 76. So to await execution by another party: Brackett v. Barney, 28 Ib. 333. For other cases on the subject of escrows see Chandler v. Chandler, 21 Ark. 95; Dyson v. Bradshaw, 23 Cal. 528; Berry v. Anderson, 22 Ind. 36; Loubat v. Kipp, 9 Fla. 60; Hathaway v. Payne, 34 N. Y. 92; Fitch v. Bunch, 30 Cal. 208; Resor v. Ohio Co., 17 Ohio St. 139; Abbott v. Alsdorf, 19 Mich. 157; Demesmey v. Gravelin, 56 Ill. 93; Stanton v. Miller, 65 Barb. 58; Roberts v. Mullenix, 10 Kan. 22.—s.

Even in the case of an escrow there must be an actual delivery—the grantor must part with control of the deed: Campbell v. Thomas, 42 Wis. 437. Although in the case of an escrow the estate does not pass until the second delivery, yet, sometimes, to prevent a failure of justice (as where the grantor dies before the second delivery), the deed will be held to relate back to the first delivery: Harkreader v. Clayton, 56 Miss. 383; Crooks v. Crooks, 34 Ohio St. 610. A third person who, according to the grantor's contract, has tendered a deed which the grantee has refused to accept, thenceforth holds the same as the depository of both parties, according to their respective rights; Adams v. Smilie, 50 Vt. 1. A fraudulent delivery by the depository of a deed deposited as an escrow will not operate to pass the title even to a subsequent *bona fide* purchaser: Cotton v. Gregory, 10 Neb. 125; Clements v. Hood, 57 Ala. 459; Cressinger v. Dessenbury, 42 Mich. 580; Robbins v. Magee, 76 Ind. 381; White v. Core, 20 W. Va. 272.

¹ Or, of course, printing: 2 Blackstone, *297; Leake, Digest of the Law of Contracts, 135.

was shaved or *polled*, as the old expression was, smooth at the edges, whereas the latter was cut or indented with teeth like a saw; for, in the very old times, when deeds were short, it was the custom to write both parts on the same skin of *parchment, and to write a word in [*13] large letters between the parts; and then, this word being cut through saw fashion, each party took away half of it; and if it became necessary to establish the identity of the instruments at a future time, they could do so by fitting them together, whereupon the word became legible (*k*). However, this, though the origin of the word *indenture*, has become a mere form; and though, as you are all aware, such instruments are still indented by nicking the edge of the parchment, not teethwise, but in an undulating line, that is a mere form, and might (as it was said) (*l*) be done in Court during the progress of a trial if it had been forgotten till then. Now, however, it is expressly enacted (*m*), "that a deed executed after the 1st day of October, 1845, purporting to be an indenture, shall have the effect of an indenture, although not actually indented."

There are one or two peculiarities of contracts made by deed, which as they apply to all contracts so made, this is the proper place to notice.

In the first place, *a contract by deed requires no consideration to support it* (*n*); or perhaps it might be more correct to say, as a general proposition, that the law conclusively presumes that it is made *upon a good and sufficient consideration (*o*).¹ The import- [*14]

(*k*) Co. Litt. 229 a; 2 Bl. Comm. 295.

(*l*) Bac. Abr. Leases, E. 2, note. But see 54 Geo. III. c. 96.

(*m*) 8 & 9 Vict. c. 106, s. 5.

(*n*) Shubrick v. Salmond, 3 Burr. 1639.

(*o*) Cooch v. Goodman, 2 Q. B. (42 E. C. L. R.) 590.

¹ The proposition in italics was properly qualified by the lecturer in the

ance of this arises from the strong line of *distinction it creates between Contracts by Deed and Simple Contracts*. For a simple contract, that is, a contract by words or by writing not under seal, requires, as I shall hereafter have occasion to explain more at length (*p*), a consideration to support it and give it validity. For instance, suppose a written promise in these words:—"I, A. B., promise C. D. that I will pay the debt he owes to E. F." This promise would be absolutely void unless it could be shown to have been made in consideration of something given or granted to A. B. for making it; for it would be a promise by him to undertake a liability without any consideration or recompense whatever; and, if he neglected to perform it, no action would lie against him, for the maxim, *ex nudo pacto non oritur actio*, would intervene for his protection. But, if to that very instrument, conceived in those very words, the additional solemnity of sealing and delivery were added, so as to make it a deed, it would become a good and binding covenant on which an action might be supported (*q*);

(*p*) LECTS. IV, V.

(*q*) See *Fallowes v. Taylor*, 7 T. R. 475.

remainder of the sentence. At common law no consideration was requisite to the validity of a deed, but since the introduction of conveyances taking effect by virtue of the Statute of Uses, courts of equity, and then courts of law, have held a consideration necessary to support such an instrument. It need not be expressed in the deed, but may be proved. But if expressed, the language of the instrument, so far as the legal effect of the deed is concerned, is conclusive (*Preston on Abstracts*, 14), and although in America, there is a numerous class of cases deciding that the consideration may, by parol, be shown to be greater or less, than is expressed (see *infra*, note 1, to page *21), yet on neither side of the Atlantic is such evidence admitted to defeat the legal effect of the deed as between the parties: *Wilt v. Franklin*, 1 Binn. 502; *Hurn v. Soper*, 6 Harr. & J. 276. Where the rights of *creditors* step in, the rule is different: *Preston, supra*; 1 Am. Lead. Cases, 1. This is merely mentioned, in order that conclusions might not be drawn from the text which the lecturer did not mean to convey, and on page *165, *infra*, he refers to the subject again. It may be here observed that there is another class of instruments which *primâ facie* presume a consideration equally with specialties, viz.: negotiable instruments. See Mr. Smith's remarks, *infra*, *181.—R.

and this is on account of the greater formality and solemnity of such an instrument (r.)¹ The reason of these different rules *cannot be better expressed than in the words of *Plowden*:—"There are [*15] two ways of making contracts or agreements for lands and chattels. The one is by words, which is the inferior method, the other is by writing (*i. e.*, by Deed), which is the superior, and because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. As if I promise to give £20 to make your sale *de novo*, here you shall not have an action against me for the £20, as it is affirmed in 17 Edward IV., for it is a nude pact, *et ex nudo pacto non oritur actio*. And the reason is, because it is by words which pass from men lightly and inconsiderately; but where the agreement is by deed, there is more time for deliberation. For when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which

(r) See *Sharington v. Strotton*, *Plowd.* 308 a; *Cruise*, Dig. tit. xxxii. c. 11, ss. 54 and 55.

¹ Thus in *Kennedy v. Ware*, 1 Pa. St. 445, the Court refused to give effect to an unsealed assignment of a judgment, intended as an advancement to the assignor's daughter, on the ground that although natural love and affection were sufficient in a sealed instrument to raise a use, yet that they of themselves formed no consideration to support a mere parol gift.—R.

Though in a contest with creditors a bond or conveyance without consideration is void, yet it is not so as between the parties. It may be, and often is, an element in the question of actual fraud or duress. "What effect has want of consideration by the common law, in regard to a bond or a judgment? Certainly none to destroy the conclusiveness of the seal or of the recovery. A voluntary bond is, both in equity and at law, a gift of the money:" *Gibson*, C. J., in *Sherk v. Endress*, 3 W. & S. 255; *Harrell v. Watson*, 63 N. C. 454; *Parker v. Flora*, *Ib.* 474; *Harris v. Harris*, 23 Gratt. 737. A voluntary bond from a father to his child, though it must be postponed to creditors, yet is good against heirs, legatees and all who stand in no higher equity than the obligor himself: *Candor & Henderson's Appeal*, 27 Pa. St. 119; *Carter v. King*, 11 Rich. Law 125.—s.

is another part of deliberation, and lastly, he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law signifying fully his good will that the thing in the deed should pass from him to the other. So that there is great deliberation used in the making *of deeds, for which reason they are received [*16] as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And, therefore, in the case put in 17 Edward IV., put it thus, that I by deed promise to give you £20 to make your sale *de novo*; here you shall have an action of debt upon this deed, and the consideration is not examinable, for in the deed there is a sufficient consideration, viz., the will of the party that made the deed. And so where a carpenter, by parol, without writing undertook to build a new house, and for not doing it the party in 11 Henry IV. brought an action of covenant against the carpenter. There it does not appear that he should have anything for building the house, and it was adjudged the plaintiff should take nothing by the writ. But if it had been by speciality it would have been otherwise. So that where it is by deed, the cause or consideration is not inquirable, nor is it to be weighed, but the party ought only to answer to the deed, and if he confesses it to be his deed he shall be bound, for every deed imports in itself a consideration, viz., the will of him that made it, and, therefore, where the agreement is by deed, it shall never be called a *nudum pactum*. And in an action of debt upon an obligation, the consideration upon which the party made the deed is not to be inquired, for it is

sufficient to say that it was his will to make the *deed" (s). Thus, although a promise to make a woman an allowance for her maintenance in [*17] consideration of past seduction is invalid, *past* seduction being, for reasons given in another place (t), no consideration in law; yet, inasmuch as an instrument under seal is good without any consideration, a bond for maintenance founded on previous seduction is good (u).¹

There are, however, some deeds deriving their effect from the Statute of Uses (x), that is, a bargain and sale, and a covenant to stand seized to uses, both of which are void without a consideration; the first requiring a pecuniary one, and the latter a consideration of blood or marriage (y).² Contracts in restraint of trade

(s) Plowd. 308, *supra*.

(t) Post, Lect. V., "Moral Considerations."

(u) *Turner v. Vaughan*, 2 Wils. 339; *Nye v. Mosely*, 6 B. & C. (13 E. C. L. R.) 133.

(x) 27 Hen. VIII. c. 10.

(y) *Sheep. Touch.* 510; 2 Bl. Comm. 338.

¹ The seduction of an innocent woman by a pretended marriage is a valuable consideration for a deed subsequently made to her and her children: *Doe v. Horn*, 1 Ind. 363. This was a case in which the question arose as to creditors, and, of course, as to them, being third parties, the seal was unimportant. A seal does not protect an illegal contract founded on a consideration, *contra bonos mores*: *Gray v. Hook*, 4 N. Y. 449. There is one American case which accords with the doctrine that past cohabitation is not a good consideration to support a promise: *Singleton v. Bremar*, Harp. 201. But *Shenk v. Mingle*, 13 S. & R. 29, rules expressly the contrary.—s.

² Prior to the passage of the Statute of Uses it was the rule that any conveyance made without consideration passed the property to the grantee, but *to the use* of the grantor. That statute, in the language of Blackstone (Book II., p. 333), "*executes the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession, thereby making cestuy que use complete owner of the lands and tenements, as well at law as in equity.*" Hence it is essential that in the case of a covenant to stand seized to uses it shall be expressed to be made in consideration of blood or marriage, and in a deed of bargain and sale, the conveyance be either for a consideration expressed in the deed, or that it shall be made to the grantee and his heirs *to and for the use* of the said grantee and his heirs.

Practically, it is customary to express in an ordinary deed that it is made to the use of the grantee and his heirs, as well as to them; and that it is for a

also are void, if made without consideration, although under seal (z).

But here, again, you must observe another well-known and important distinction, namely, that though it is not necessary to show on what consideration a deed is founded, a party sued on it is always, on his part, allowed [*18] to show that it was *founded on an illegal or immoral consideration, or that it was obtained by duress or by fraud; for, were the law otherwise, deeds would, to use the expression of Lord *Ellenborough* (a), be made use of as covers for every species of wickedness and illegality. It is therefore a well-established proposition, that a deed may be invalidated by showing that it is tainted by such circumstances (b). And it signifies not whether the illegality objected to it be a breach of the rules of common law, or consist in the contravention of the provisions of some statute, or whether the prohibition of the statute be expressed in direct terms, or be left to be collected from a penalty being inflicted on the offender (c). Thus, in *Collins v. Blan-*

(z) *Mitchell v. Reynolds*, 1 P. Wms. 181. See *Wallis v. Day*, 2 M. & W. 277; *Horner v. Graves*, 7 Bing. (20 E. C. L. R.) 744; *Hutton v. Parker*, 7 Dowl. 739; *Mallan v. May*, 11 M. & W. 665; *Tallis v. Tallis*, 22 L. J. (Q. B.) 185; 1 E. & B. (72 E. C. L. R.) 39; *Collins v. Locke*, 4 App. Cas. 674; 48 L. J. (P. C.) 68.

(a) *Paxton v. Popham*, 9 East, 421.

(b) See *Collins v. Blantern*, 2 Wils. 341; 1 Smith, L. C. 387, 8th ed.

(c) *Bartlett v. Vinor*, Carth. 251; *Cundell v. Dawson*, 4 C. B. (56 E. C. L. R.) 376; *Ritchie v. Smith*, 6 C. B. (60 E. C. L. R.) 462; *Cope v. Rowlands*, 2 M. & W. 149; *M'Kinnel v. Robinson*, 3 M. & W. 434.

pecuniary consideration. It has been held in some cases that this is essential; but the established rule seems to be that any valuable consideration is sufficient to support a deed of bargain and sale. It may be expressed in the deed or proved *alunde*, and if a consideration be expressed, something different, provided it be not inconsistent, may be shown to have been the actual consideration. It is always competent to show that the consideration was something different from that which is stated, or that it has not in fact been paid, for any purpose except to affect the validity of the deed as a conveyance of title. For that purpose the acknowledgment of consideration in the deed is conclusive. See *Williams, Real Prop.* *188; 2 *Washburne, Real Prop.* *613; note 1, p. *21, *infra*.

tern,¹ the consideration was the compromise of an indictment for perjury; in *Coppock v. Bower* (*d*), the compromise of an election petition; in *Hindley v. M. of Westmeath* (*e*), a future separation between husband and wife (*f*). In these cases the illegality consisted in the infringement of the rule of the common law, which looks upon such contracts as *improper. In [*19] other cases, as I said, the contravention of a statute has been held equally fatal: as, of the statutes against gaming (*g*); of the Acts for licensing playhouses (*h*); of the stat. 6 Anne, c. 16, for requiring brokers acting within the city and liberties of London to procure themselves to be admitted by the Lord Mayor and Aldermen (*i*).² And a great variety of examples might be

(*d*) 4 M. & W. 361.

(*e*) 6 B. & C. (13 E. C. L. R.) 200.

(*f*) See *Jones v. Waite*, 5 Bing. N. C. (35 E. C. L. R.) 341, 4 M. & Gr. (43 E. C. L. R.) 1104, in Dom. Proc.; *Wilson v. Wilson*, 23 L. J. (Ch.) 697.

(*g*) *Colborne v. Stockdale*, Str. 493; *Mazzinghi v. Stephenson*, 1 Camp. 291. See *M'Kinnel v. Robinson*, 3 M. & W. 434, which, however, was a simple contract.

(*h*) *Levy v. Yates*, 8 A. & E. (35 E. C. L. R.) 129. See *De Begnis v. Armistead*, 10 Bing. (25 E. C. L. R.) 110, per Tindal, C. J.

(*i*) *Cope v. Rowlands*, 2 M. & W. 149.

¹ And see the notes to that case in 1 Smith's Leading Cases, 8th Am. ed.—s.

² "Every contract," said Lord Holt, in *Bartlett v. Viner*, Carth. 252, "made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute;" and although attempts have been at times made to consider these words as mere *dicta*, yet the rule thus stated has been repeatedly enforced: *Nerot v. Wallace*, 3 T. R. 17; *Mitchell v. Smith*, 1 Binn. 110; *Foster v. Taylor*, 5 B. & Ad. (27 E. C. L. R.) 887; *Cope v. Rowlands*, 2 M. & W. 158; though with respect to cases depending upon the English revenue laws, there appears to be a little discrepancy of decision as to whether those acts intended to vitiate the contract, or to impose a penalty, for the purposes of the revenue, on the party offending: *Johnson v. Hudson*, 11 East, 180; *Brown v. Duncan*, 10 B. & C. (21 E. C. L. R.) 93; *Wetherell v. Jones*, 3 B. & Ad. (5 E. C. L. R.) 221; *Cope v. Rowlands*, 2 M. & W. 149; *Smith v. Mawhood*, 14 Ib. 461. Some of these decisions are referred to in a case in the Supreme Court of the United States (*Harris v. Runnels*, 12 How. 79), where, as a defence to the

given, but these are sufficient to establish the principle that, though a man cannot defend himself from liability upon his contract made by deed, by saying that there was no consideration for it,¹ he may by saying that there was an illegal one.² And it must be observed, that a

purchase-money of certain slaves, it was set up that no certificate had been obtained previous to the bringing the slaves into the State of Mississippi, that they had not been guilty of any crime, &c., as was required by a law of that State, which imposed a penalty of \$100 for every slave so purchased and brought in; and the Court, in holding the contract itself not vitiated by this statute, said, "We have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application to every case is denied. It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes *unlawful*, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."—R.

To determine whether a contract made contrary to the provisions of a penal statute is illegal and void, the statute must be considered as a whole to ascertain whether it was intended to have that effect: *Vining v. Bricker*, 14 Ohio St. 331. Such intent will be presumed unless the contrary can be fairly inferred: *Bemis v. Becker*, 1 Kans. 226. Courts will not, even with consent of the parties, enforce a contract which is in violation of a statute, though not therein declared void: *Fowler v. Scully*, 72 Pa. St. 456.—S.

¹ Nor at common law would fraud be a defence to an action on a specialty, unless, indeed, the fraud related to the execution of the instrument: *Vrooman v. Phelps*, 2 Johns. 177; *Rogers v. Colt*, 21 N. J. 704; but in many of our States, the common law rule as to the solemnity of a seal estopping the obligor from any defence except those named, has been relaxed by statutory provisions, so as to entitle the obligor of a bond, under some restrictions, to show, by way of defence, its failure, as he formerly could have done its illegality of consideration.—R.

² The often-quoted remarks of Lord Mansfield upon this rule may bear repetition here. "The objection," said he, "that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the

contract, although not expressly prohibited by a statute, may be illegal, if opposed to the general policy and intent thereof, as if made to insure to one creditor of a bankrupt a greater share of his debt than the others can have (*k*); or a contract made in order to enable another to infringe that policy and intent (*l*). These contracts are invalid, and cannot be sued upon, although [*20] *under seal. Even if there were several considerations, and any one of them was illegal, it avoids the whole instrument; for it is impossible to say how much or how little weight the illegal portion may have had in inducing the execution of the entire contract (*m*). Though it is just the reverse where the consideration is good, and there are several covenants, some legal, some illegal: for then the illegal promises alone will be void, and the legal valid (*n*).¹ As when, upon a dissolution

(*k*) *Staines v. Wainewright*, 6 Bing. N. C. (37 E. C. L. R.) 174. See *Ex parte Oliver, re Hodgson*, 4 De G. & S. 354.

(*l*) *M Kinnel v. Robinson*, 3 M. & W. 434; *De Begnis v. Armistead*, 10 Bing. (25 E. C. L. R.) 110.

(*m*) *Waite v. Jones*, 1 Bing. N. C. (27 E. C. L. R.) 662, per Tindal, C. J.; *Shackell v. Rosier*, 2 Bing. N. C. (29 E. C. L. R.) 634; *Howden v. Haigh*, 11 A. & E. (39 E. C. L. R.) 1033.

(*n*) *Gaskell v. King*, 11 East, 165; *How v. Synge*, 15 East, 440.

mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise, *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, '*potior est conditio defendentis*.'"
Holman v. Johnson, 1 Cowp. 343; *Gray v. Hook*, 4 N. Y. 449.—R.

¹ Where covenants, illegal as against public policy, enter into and form a part of the entire consideration of a contract and both parties are in fault, the

of partnership, one partner purchased the other's moiety, and the latter covenanted not to carry on a similar trade within the cities of London and Westminster, or within 600 miles thereof, the Exchequer Chamber held that the covenant was void as to the 600 miles, as an unreasonable restraint of trade; but good as to the cities of London and Westminster (*o*).

The next quality of a contract by deed is its operation by way of *estoppel*; the meaning of which is, that the person executing it is not permitted to contravene or disprove what he has there asserted, though he may do so where the assertion is in a contract not under seal.

[*21] A good example *of this is the case of a receipt.

A *creditor* who has given a receipt not under seal is nevertheless permitted to prove that he has not received the money (*p*); but it is otherwise if the receipt be by deed, for then the law admits no evidence to the contrary (*q*).¹ Such is the nature of what we call

(*o*) *Price v. Green*, 16 M. & W. 346; *Nicholls v. Stretton*, 10 Q. B. (59 E. C. L. R.) 346. See also *Robinson v. Ommaney*, 21 Ch. Div. 780; 23 Ib. 285; 51 L. J. (Ch.) 894; 52 Ib. 440.

(*p*) *Graves v. Key*, 3 B. & Ad. (23 E. C. L. R.) 313; *Stratton v. Rastall*, 2 T. R. 366; *Farrer v. Hutchinson*, 9 A. & E. (36 E. C. L. R.) 641; *Bowes v. Foster*, 27 L. J. (Ex.) 262; 2 H. & N. 779; *Lee v. Lancashire and Yorkshire Rail. Co.*, L. R. 6 Ch. 527.

(*q*) See the judgment of the Court in *Fitch v. Sutton*, 5 East, 230.

contract is wholly void. A separation of the good consideration from that which is illegal will be attempted only in those cases in which the party seeking to enforce the contract is not the wrongdoer: *Saratoga County Bank v. King*, 44 N. Y. 87; *Marsh v. Russell*, 2 Laus. 340 [reversed 66 N. Y. 288]. A contract based in part upon an illegal transaction is void *in toto*; but if based in part on a void transaction is void only *pro tanto*: *Doty v. Knox Bank*, 16 Ohio St. 133; *Bank v. Stegall*, 41 Miss 142. If part of a single consideration is illegal the whole promise fails: *Chandler v. Johnson*, 39 Ga. 85, and see *Gelpcke v. Dubuque*, 1 Wall. U. S. 221; *Decker v. Morton*, 1 Redf. Surr. 477; *Kottwitz v. Alexander*, 34 Tex. 689.—s.

¹ The current of authority, however, on this side of the Atlantic, has much relaxed the strictness of the English cases on this subject. Thus it may be considered as settled, notwithstanding some early cases to the contrary, that evidence is admissible, either on the part of the grantor or the grantee, to

an *estoppel* created by deed (*r*), the principle of which is explained by *Taunton, J.*, in *Bowman v. Taylor* (*s*). "The principle," said his Lordship, "is not so unjust or absurd as it has been too much the custom to represent. The principle is, that, where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted." Therefore, for example, if a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that

(*r*) *Shelley v. Wright*, Willes, 9; *Hill v. Manchester and Salford Waterworks*, 2 B. & Ad. (22 E. C. L. R.) 544.

(*s*) 2 A. & E. (29 E. C. L. R.) 278.

show that the consideration named in the deed was really greater or less than is there expressed: *Bullard v. Briggs*, 7 Pick. 533; *Wade v. Merwin*, 11 Ib. 288; *Clapp v. Tirrell*, 20 Ib. 247; *McCrea v. Purmort*, 16 Wend. 460 (where many authorities are cited and commented on); *Burbank v. Gould*, 15 Me. 118; *Belden v. Seymour*, 8 Conn. 310; *Meeker v. Meeker*, 16 Ib. 383; *Beach v. Packard*, 10 Vt. 96; *Bingham v. Weiderwax*, 1 N. Y. 509; *Watson v. Blaine*, 12 S. & R. 131; *Jack v. Dougherty*, 3 Watts, 158; *Bolton v. Johns*, 5 Pa. St. 145; *Harvey v. Alexander*, 1 Rand. 219; *Wilson v. Shelton*, 9 Leigh. 342; *Curry v. Lyles*, 2 Hill (S. C.) 404; *Moore v. McKie*, 5 Sm. & M. 238; unless such evidence is introduced, either directly or indirectly, for the purpose of defeating the operation of the instrument as a conveyance, as by showing it void for want of a sufficient consideration: *Wilt v. Franklin*, 1 Binn. 502; *Hurn v. Soper*, 6 Harr. & J. 276. Thus a grantee may prove the expressed consideration to be greater, for the purpose of increasing his damages on the covenants in the deed: *Belden v. Seymour*, 8 Conn. 310; while on the other hand the grantor may prove it less for the purpose of diminishing them: *Morse v. Shattuck*, 4 N. H. 229; *Harlow v. Thomas*, 15 Pick. 70.—R.

See *Murphy v. Branch Bank of Mobile*, 16 Ala. 90; *Den. v. Shotwell*, 23 N. J. 465; *In re Young's Estate*, 3 Md. Ch. D. 461; *Hammond v. Woodman*, 41 Me. 177; *Harwell v. Fitts*, 20 Ga. 723; *Farrington v. Barr*, 36 N. H. 86; *Thompson v. Allen*, 12 Ind. 539. The consideration clause in a deed estops the grantor from denying that a consideration has been received. In all other respects, it is open to explanation or correction by parol evidence, and it may be shown that the consideration has not been actually paid, or that it has been overpaid by fraud or mistake: *Goodspeed v. Fuller*, 46 Me. 141; *Irvine v. McKeon*, 23 Cal. 472; and see *Carbrey v. Willis*, 7 Allen, 364; *Allen v. Allen*, 45 Pa. St. 468; *Dodge v. Walley*, 22 Cal. 224; *Simson v. Eckstein*, Ib. 580.—S.

instrument, and in an action upon it, it is not competent for the party bound to deny the recital (*t*). But an [*22] allegation *must, in order to operate as an *estoppel*, be clear, distinct, and definite (*u*). As where A. having an equitable estate in fee in certain lands, mortgaged them to B., reciting in the instrument of mortgage that he was legally or equitably entitled to them. He afterwards obtained the legal estate, and conveyed the latter to C. The Court of King's Bench held that, there being in the instrument of mortgage no certain and precise averment of any seisin in A., but merely a recital that he was *legally or equitably* entitled, C., who claimed under A., was not estopped from setting up against B. the legal estate so acquired by him (*x*). Such a recital is indeed the hypothesis upon which the contract is made by the parties; and therefore it would quite overthrow their mutual intention, if, in the absence of fraud, the recital could be denied. For the same reason, the *estoppel* has no effect in matters not depend- [*23] ing upon that contract; thus even a *party to a deed is not estopped in an action by another party, not founded on the deed but wholly collateral to it, from disputing the facts so admitted therein (*y*). In such case evidence of the circumstances under which the admission was made, is receivable to show that it

(*t*) *Carpenter v. Buller*, 8 M. & W. 209; *Pilbrow v. Pilbrow's Atmospheric R. Co.*, 5 C. B. (57 E. C. L. R.) 440; *Young v. Raincock*, 7 C. B. (62 E. C. L. R.) 310; *Stronghill v. Buck*, 19 L. J. (Q. B.) 209; 14 Q. B. (68 E. C. L. R.) 781. See per Wood, V. C., in *Carter v. Carter*, 3 Kay & J. 617, 645; 27 L. J. (Ch.) 74, 84.

(*u*) *Right d. Jeffereys v. Bucknell*, 2 B. & Ad. (22 E. C. L. R.) 278; *Lainson v. Tremere*, 1 A. & E. (28 E. C. L. R.) 792; *Heath v. Crealock*, L. R. 10 Ch. 22; 44 L. J. (Ch.) 157; *General Finance, Mortgage, and Discount Co. v. Liberator Permanent Benefit Building Soc.*, 10 Ch. Div. 15.

(*x*) *Right v. Bucknell*, 2 B. & Ad. (22 E. C. L. R.) 278, *supra*; *Heath v. Crealock*, L. R. 10 Ch. 22; 44 L. J. (Ch.) 157; *General Finance, Mortgage, and Discount Co. v. Liberator Permanent Benefit Building Soc.*, 10 Ch. Div. 15.

(*y*) *Carter v. Carter*, *supra*; *Fraser v. Pendlebury*, 31 L. J. (C. P.) 1.

was inconsiderately made, and is not entitled to weight as a proof of the fact it is used to establish (z). For the same reason, if all the facts appear by the deed, a party thereto is not estopped from averring them although they are contradictory to some part of the deed (a). An instructive instance of an estoppel is afforded by the case of *Wiles v. Woodward* (b). In this case the plaintiff and defendant had been in partnership together as paper manufacturers and iron merchants. The partnership was dissolved by deed, by which it was recited that an agreement had been made that the defendant should have all the stock in trade of the business of paper merchants, but that the plaintiff should receive paper out of that stock to the value of £898 4s. 11d., which was to remain in the paper mill for a year. *On the other hand the plaintiff was to have the [*24] stock in trade in the iron business. The deed further recited, that, in pursuance of that arrangement, *paper of that value had been delivered to the plaintiff, and that the same then was in the paper mill, as the plaintiff thereby acknowledged.* It then contained an assignment by the defendant to the plaintiff of all the stock in trade of the iron business, and by the plaintiff to the defendant of all the stock in trade of the paper making business, except the £898 4s. 11d. worth of paper delivered to the plaintiff, and mutual releases, and a dissolution of the old partnership. In fact no paper had been delivered or set apart; and in an action of trover for it, it was contended by the defendant, that

(z) *Carpenter v. Buller*, *supra*.

(a) *Co. Litt.* 352 b.; *Pargeter v. Harris*, 7 Q. B. (53 E. C. L. R.) 708; *Dancer v. Hastings*, 4 Bing. (13 E. C. L. R.) 2; *Jolly v. Arbuthnot*, 4 De G. & J. 224; *Morton v. Woods*, L. R. 3 Q. B. 658; 4 Ib. 293 (Ex. Ch.); 37 L. J. (Q. B.) 242; 38 Ib. 81; *Rowbotham v. Wilson*, 27 L. J. (Q. B.) 61, per Watson, B.; 8 E. & B. (92 E. C. L. R.) 123.

(b) 5 Exch. 557.

no certain quantity having become the property of the plaintiff, no definite paper could be said to be his; and consequently, that an action of trover, not being an action on the deed, and which implies that the thing sued for is the plaintiff's, could not be supported. But the Court of Exchequer considered that the parties were estopped by the deed, not merely in an action thereon, but in this proceeding, which was to enforce the rights arising out of it. "A recital," said Parke, B., delivering the judgment of the Court, "when it is of a fact agreed upon by both, binds both; and the present claim is not collateral to the deed, as in *Carpenter v. Buller*. It is, therefore, an estoppel on both. The parties have [*25] agreed, with respect to *the stock in trade in the paper business, that they should stand precisely in the same situation as if the stock had been divided, and that part amounting to the stipulated sum had been delivered to the plaintiff; and, being in that situation, the question is what their respective rights are."¹

¹One of the most frequent occurring instances of estoppel *in pais*, or, as it should be in this case more correctly termed, equitable estoppel, is the rule which, in its general application, prohibits the tenant from denying his landlord's title, and which, although it has been supposed to have been feudal in its origin, seems to have arisen in later times. See Judge Hare's note to *Duchess of Kingston's case*, 2 *Smith's Lead. Cas.*, 8th ed.; *Morris on Replevin*, 121. "The principle was of necessity called into being by that feature of the action of ejectment which requires an absolute possessory title in the plaintiff, and makes, in its absence, the mere fact of possession decisive in favor of the defendant. The result of allowing the tenant to deny the right of the landlord, in an ejectment for the land, would therefore be to take the estate from the latter, and confer it on the former, whenever there was a defect, either in the title itself, or the proof brought forward to sustain it. This would obviously be equally inconsistent with public policy and private faith, and would prevent men from letting their property, even when they are unable to use it themselves. When, therefore, possession is obtained under a lease, the lessee is estopped from keeping the land in violation of the agreement under which it was acquired." Note to *Duchess of Kingston's case*.

The rule, therefore, is a very general one with respect to an ejectment brought by the landlord against the tenant (unless, indeed, in the case where the assent of the latter is produced by the fraud or misrepresentation of the

Before quitting this head of Estoppel, it must be observed that as the deed takes effect from the delivery,

former: *Miller v. M'Brier*, 14 S. & R. 382; *Hockenbury v. Snyder*, 2 W. & S. 240), and also with respect to actions brought by the landlord to recover the rent, for the "mischief to which the absence of such a rule as between landlord and tenant must lead, would evidently be that a tenant, having obtained the possession from his landlord, could betray it to another, and thus drive the former to an ejectment to regain the possession. The result would be that no landlord would ever be safe from the prospect of litigation. Hence the tenant's obligation to restore to him the possession?" *Rawle on Covenants for Title*, 235. It may also be observed that where the lease is by indenture, the law of "estoppel by deed" applies: *Jordan v. Twells*, Rep. Temp. Hardw. 171; *Palmer v. Elkins*, 2 Raym. 1550. And where the action is assumpsit for use and occupation, the issue sought to be raised by the question of title is an immaterial one: *Lewis v. Willis*, 1 Wils. 314; *Doe v. Smythe*, 4 M. & S. 347; *Cobb v. Arnold*, 8 Metc. 398.

The rule only operates, however, to debar the tenant from denying the title at the time of possession given, and he is at liberty to show that it has since expired or been defeated: *Walton v. Waterhouse*, 2 Wms. Saund. 418, note; *Hopcroft v. Keys*, 2 M. & Sc. 767; *Jackson v. Rowland*, 6 Wend. 666; *Devacht v. Newsam*, 3 Ohio, 57; *Randolph v. Carlton*, 8 Ala. 606; or such circumstances as amount to a constructive eviction, as by being compelled to make payments to a mortgagee, ground landlord, &c.: *Doe v. Barton*, 11 A. & E. (39 E. C. L. R.) 314; *Mayor of Poole v. Whitt*, 15 M. & W. 577; *Waddilove v. Barnett*, 2 Bing. N. C. (29 E. C. L. R.) 538; *Franklin v. Carter*, 1 C. B. (50 E. C. L. R.) 760; *Jones v. Clark*, 20 Johns. 51; *Magill v. Hillsdale*, 6 Conn. 469; *Smith v. Shepard*, 15 Pick. 147; *Welch v. Adams*, 1 Metc. 494; *George v. Putney*, 4 Cush. 355; *Greeno v. Munson*, 9 Vt. 37; *Chambers v. Pleak*, 6 Dana, 428.—E.

One entering as a sub-tenant is in like manner estopped from denying the title of the paramount landlord: *Milhouse v. Patrick*, 6 Rich. 350; [*Jones v. Dove*, 7 Or. 467; and the heirs of a tenant while standing solely on his right: *Lewis v. Adams*, 61 Ga. 559.] When one, however, already in possession, acknowledges himself to be the tenant of another, he may destroy the effect of such acknowledgment by showing that it was procured by fraud, or proceeded from a clear mistake as to title: *Givens v. Mullinax*, 4 Rich. 590. The gratuitous payment of rent by one in possession of real estate does not estop him from showing the true character in which he holds the premises: *Shelton v. Carrol*, 16 Ala. 148. And see upon the general principle of a tenant's being estopped from controverting his lessor's title: *Cody v. Quarterman*, 12 Ga. 386; *Freeman v. Heath*, 13 Ired. 498; *Sims v. Glazener*, 14 Ala. 695; *Pope v. Harkins*, 16 Ib. 321; *Hoen v. Simmons*, 1 Cal. 119; *Henly v. The Branch Bank*, 16 Ala. 552. A tenant, after the tenancy has terminated, and he has restored the possession to his landlord, may assert a title paramount against him, and the previous tenancy cannot bar his right to recover: *Smith v. Mundy*, 18 Ib. 182; *Page v. Kinsman*, 43 N. H. 328; *Wilson v. James*, 79 N. C. 349; *Rogers v. Boynton*, 57 Ala. 501. He may show also that the land-

not from the apparent date, neither party can be estopped from showing the real date of the delivery, although by doing so a very different meaning may be given to the deed from that which would be given to it if the parties were estopped from denying that the date was the time from which the deed commenced in effect. Thus, where a charter-party, dated 6th February, contained a covenant that a ship should proceed from Demerara, where she then lay, on or before 12th February, the defendant was allowed to show that the charter-party was, in fact, not executed till 15th March, and that therefore the condition as to the time of sailing was dispensed with (c).

But notwithstanding the strong terms in which estoppel is often described as peculiar to a deed, it must not be supposed that a party cannot be estopped by any other act (d), although estoppel by deed is much the

(c) *Hall v. Cazenove*, 4 East, 477.

(d) *M'Cance v. London and North Western Railway*, 34 L. J. (Ex.) 39.

lord's title has expired, or that he has sold his interest to another: *Horner v. Leeds*, 25 N. J. 106; *Russel v. Allard*, 18 N. H. 222. He may purchase his landlord's title at sale on execution, and may set up the title thus acquired against his landlord: *Elliott v. Smith*, 23 Pa. St. 131; *Wolf v. Johnson*, 30 Miss. 513; *Bettison v. Budd*, 17 Ark. 546. A tenant may show that his landlord's title has ceased, even though he has paid rent to the assignee: *M'Devitt v. Sullivan*, 8 Cal. 592. If one in possession under claim of title is by fraud or mistake induced to believe that another has a better title, and therefore to take a lease from him, the tenant will not be estopped by that lease from denying the lessor's title: *Alderson v. Miller*, 15 Gratt. 279; *Pearce v. Nix*, 34 Ala. 183; *Cramer v. Carlisle Bank*, 2 Grant, 267; *Schultz v. Arnot*, 33 Mo. 172; *Cain v. Gimon*, 36 Ala. 168. A tenant is not estopped from denying the title of his landlord after he has surrendered possession: *Zimmerman v. Marchland*, 23 Ind. 474.—s.

A tenant is estopped from denying the title of his landlord's assignee: *People v. Angel*, 61 How. Pr. 159. A tenant who accepts a lease under an entire misapprehension of its purport is not estopped to deny the title of his landlord: *Wiggin v. Wiggin*, 58 N. H. 235. A lessee who has never taken possession is not estopped to deny his landlord's title: *District of Columbia v. Johnson*, 1 Mackey (D. C.) 51.

most frequent. "Touching *estoppels, which is an excellent and curious part of learning," says [*26] Lord *Coke* (e), "it is to be observed that there be three kinds of estoppels, viz., by matter of record, by matter in writing (i.e., by deed), and by matter *in pais*. By matter of record, viz., by letters patent, fine, recovery, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittance"—some of which records are now obsolete. "By matter in writing, as by deed"—of which we have already treated. "By matter *in pais*, as by livery, by entry, by acceptance of rent, by partition, by acceptance of an estate, whereof Littleton maketh a special observation, that a man shall be estopped by matter in the country without any writing." Of estoppel, by matter of record, it is not requisite to say more; but one or two examples of estoppel *in pais* will be useful, both as showing that the force of an estoppel is not peculiar to a deed, and as illustrating still further the grounds and reasons of estoppel by deed itself. In *Pickard v. Sears* (f) it was laid down by the Court of Queen's Bench that the rule of law is clear, "that, where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position; the former is concluded from averring against the latter a different state of [*27] *things as existing at the same time." "By the term '*wilfully*,' however, in that rule," to quote the words of Parke, B., in *Freeman v. Cooke* (g), "we must understand, if not that the party represents that to be true, which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon

(e) Co. Litt. 352.

(f) 6 A. & E. (33 E. C. L. R.) 474; *Heane v. Rogers*, 9 B. & C. (17 E. C. L. R.) 586.

(g) 2 Ex. 654, 663.

accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the *fact* in the usual mode that the continuing partners are no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised. In truth, in most cases to which the doctrine in *Pickard v. Sears* is to be applied, the representation is such as to amount to the contract or license of the party making it." Again, where a railway company had been deceived by a forged transfer into registering shares, and granting certificates of registration of the shares, [*28] *in the names mentioned in the forged transfer, whereby innocent persons were induced to purchase those shares, under the belief that the vendors were registered shareholders; it was held that the principle above laid down was applicable, and that the company were estopped by their own act from denying the right of the innocent transferees of the shares to be registered as shareholders (*h*).¹ In short,

(*h*) *In re Bahia, &c., Rail. Co.*, L. R. 3 Q. B. 584; 37 L. J. (Q. B.) 176; followed in *Hart v. Frontino, &c., Co.*, L. R. 5 Ex. 111; 39 L. J. (Ex.) 93; see also *Shaw v. The Port Philip and Colonial Gold Mining Co.*, 13 Q. B. D. 103; 53 L. J. (Q. B.) 369. The issue, however, of the certificate of registration

¹ It is not necessary to an estoppel that the party should design to mislead, if his act was calculated to mislead, and actually has misled another acting upon it in good faith: *Bank v. Hazard*, 30 N. Y. 226; *contra*, *Plumer v. Lord*, 9 Allen 455; *Turner v. Coffin*, 12 Ib. 401; *Rice v. Bunce*, 49 Mo. 231; *Conti-*

to use the words of Lord Blackburn in *Burkinshaw v. Nicolls* (i), "when a person makes *to another the representation, 'I take upon myself to say' [*29]

does not necessarily estop the company from setting up the forgery as between themselves and the person who innocently brings the forged transfer to them, and invites them to register it; although they would be estopped by the certificate as against those who might have purchased from that person on the faith of that certificate. See *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D. 188; 49 L. J. (Q. B.) 392. For other illustrations of the doctrine of estoppel by conduct see *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642; 39 L. J. (Q. B.) 221; *Ashpitel v. Bryan*, 32 L. J. (Q. B.) 91; 33 Ib. 328; *Phillips v. im Thurn*, L. R. 1 C. P. 463; 35 L. J. (C. P.) 220; *Carr v. London and Northwestern Railway Co.*, L. R. 10 C. P. 307; 44 L. J. (C. P.) 109; *Coventry v. Great Eastern Railway Co.*, 11 Q. B. D. 776; 52 L. J. (Q. B.) 695. The student is also referred to 2 Smith's L. C., notes to *Doe v. Oliver*, pp. 879-912, 8th ed.

(i) 3 App. Cas. 1004, 1026; 48 L. J. (Ch.) 179, 189. This case affirmed *In re British Farmers' Pure Linseed Cake Co.*, 7 Ch. D. 533; 47 L. J. (Ch.) 415, where the C. A. held that a company having issued certificates that certain shares were fully paid up, were afterwards estopped, as was also the liquidator of the company, from showing that nothing had been paid, as against a purchaser for value without notice of any irregularity.

mental Bank v. Bank of Commonwealth, 50 N. Y. 575. Although there is a seeming conflict in the decisions, yet the decided weight of authority is that a party is not estopped by his acts or declarations from showing the truth, unless such acts or declarations were intended to influence the conduct of another, or he had reason to believe they would: *Kuhl v. Mayor*, 23 N. J. Eq. 84. Silence alone will not postpone unless in cases where it is a fraud; but positive acts of encouragement bar the assertion of a right even though they were done with no fraudulent intent: *Maple v. Kussart*, 53 Pa. St. 348; *Chapman v. Chapman*, 59 Ib. 214. A party has no right, in his dealings with another, to state a fact to be true, which he does not know to be true, and which fact may influence the conduct of the other party. If such a fact be stated to obtain a benefit at the expense of the other party and to his prejudice, and it appears that there was no reasonable or probable ground for a belief in the existence of such fact, the inference is that there was no belief, and the statement under such circumstances has the effect of and may be properly treated as a fraud: *Nugent v. Cincinnati R. R. Co.*, 2 Disn. 302; *Rice v. Bunce*, 49 Mo. 231. See further as to estoppels *in pais*: *Heath v. Derry Bank*, 44 N. H. 174; *Judevine v. Goodrich*, 35 Vt. 19; *Shaw v. Beebe*, Ib. 205; *Wooley v. Edson*, Ib. 214; *Lesley v. Johnson*, 41 Barb. (N. Y.) 359; *Whitacre v. Culver*, 8 Minn. 135; *Hazleton v. Batchelder*, 44 N. H. 40; *Spiller v. Scribner*, 36 Vt. 245; *Mason v. Williams*, 8 Jones (Law) 478; *Edwards v. Evans*, 16 Wis. 181; *Martin v. Zellerback*, 38 Cal. 300; *Simpson v. Pearson*, 31 Ind. 1; *Austin v. Thomson*, 45 N. H. 113; *Cain v. Busby*, 30 Ga. 714; *Martin v. Fox Co.*, 19 Wis. 552; *Casco Bank v. Keene*, 53 Maine, 103; *Garlinghouse v. Whitwell*, 51

such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it is of the very essence of justice that between those two parties their rights should be regulated not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action; and that is what is meant by estoppel *in pais*."

The next peculiarity in a contract by deed is its effect in creating a *merger*. This happens when an engagement has been made by way of simple contract, that is, by words in writing not under seal, and afterwards the very same (*k*) engagement is entered into between the same parties by a deed. When this happens, the simple contract is merged, lost, sunk, as it were, and swallowed up in that under seal, and becomes totally extinguished (*l*). Suppose, for instance, I give my creditor a promissory note for £50, and then a bond for the same demand, the note is lost, swallowed up in the bond, and becomes totally extinct and useless (*m*). Or, if a devisee, in trust to sell lands and pay debts of the devisor out of the proceeds, borrow money for [*30] *that purpose, and by indenture between him and the lender charges the land with the amount, and covenants to pay the money borrowed out of such money as shall come to his hands as such trustee, the claim of the lender is upon the covenant, and the simple contract which arose from the borrowing is sunk in the special agreement (*n*). But the engagement by deed

(*k*) See *Yates v. Aston*, 4 Q. B. (45 E. C. L. R.) 182.

(*l*) *Price v. Moulton*, 20 L. J. (C. B.) 102; 10 C. B. (70 E. C. L. R.) 561.

(*m*) *Bayley on Bills*, 6th edition, 334.

(*n*) *Matthew v. Blackmore*, 26 L. J. (Ex.) 150; 1 H. & N. 76.

Barb. 208; *Ridgway v. Morrison*, 28 Ind. 201; *Moore v. Bowman*, 47 N. H. 494; *Darrah v. Bryant*, 56 Pa. St. 69; *Young v. Foute*, 43 Ill. 33; *McCabe v. Raney*, 32 Ind. 309.—s.

must be so completely identical with that by the simple contract, that the remedy upon the deed must be co-extensive with the remedy upon the simple contract, else there is no merger (*o*).¹ Thus, where a banker takes

(*o*) *Ansell v. Baker*, 15 Q. B. (69 E.C. L. R.) 20. See *Boaler v. Mayor*, 34 L. J. (C. P.) 230

¹ *Curson v. Monteiro*, 2 Johns. 308; *Bray v. Bates*, 9 Metc. 250; and see *passim* the notes to *Cumber v. Wane*, in 1 Smith's Lead. Cas. The operation of this principle of law, and the distinction between a merger and a satisfaction of a debt, have been thus ably pointed out by Gibson, C. J., in *Jones v. Johnson*, 3 W. & S. 277: "There is a substantial distinction, which I have not seen particularly noticed, between cases of extinguishment by merger of the security, and cases of extinguishment by satisfaction of the debt. These classes, though depending on different principles, have usually been confounded, and hence a perceptible want of precision in the language of those who have written or spoken of them. In the first of them the original security is extinguished, but the debt remains: in the second, the debt as well as the security is extinguished by the acceptance of another debt in payment of it. Extinguishment by merger takes place between debts of different degrees, the lower being lost in the higher, and, being by act of law, it is dependent on no particular intention; extinguishment by satisfaction takes place indifferently between securities of the same degree or of different degrees, and, being by act of the parties, it is the creature of their will. No expression of intention would control the law which prohibits distinct securities of different degrees for the same debt; for no agreement would prevent an obligation from merging in a judgment on it, or passing *in rem judicatum*. Neither would an agreement, however explicit, prevent a promissory note from merging in a bond given for the same debt by the same debtor; for, to allow a debt to be, at the same time, of different degrees, and recoverable by a multiplicity of inconsistent remedies, would increase litigation, unsettle distinctions, and lead to embarrassment in the limitation of actions, and the distribution of assets. But as the existence of a promissory note as a concurrent security for a book debt produces no such consequences, it operates no extinguishment by act of the law; and it depends on the assent of the parties, tacit or explicit, whether the new evidence of the debt is accepted in discharge of the old one. It is true there are presumptions which operate even in cases of intention, as *prima facie* evidence on the one side or the other; for instance, that a bond given by a stranger after the debt incurred was accepted as collateral security. These, however, are legal presumptions of mere facts to be drawn by the jury under the direction of the court, and not, as in merger, *presumptiones juris et de jure*, which are so absolute that they cannot be rebutted.

"But, merger takes place only where the debt is one, and the parties to the securities are identical. Hence there is no extinguishment where a stranger gives bond for a simple contract debt, or confesses a judgment for a debt by specialty. In either case the original debt may be extinguished by the subse-

from a customer and a surety a bond for payment of all sums advanced, or to be advanced, to the customer, there is no merger, for the special contract differs from the simple in securing the payment of other and additional moneys, and also from another and additional person (*p*). So

(*p*) *Holmes v. Bell*, 3 M. & G. 213; *Norfolk Railway Co. v. M'Namara*, 3 Ex. 628.

quent one, but not by merger, which works a dissolution not of the debt, but of the original security, whose existence sinks into that of the succeeding one, and for that purpose the union must be so intimate that the one cannot be separated from the other. In a case of merger, therefore, the debt is the same, though the old evidence of it melts into the new one, and the creditor merely gains a higher security without having an indivisible debt of different degrees, but such a result is not obtained where the debt is compounded of new responsibilities, as it must be where all the parties were not originally bound. When the debtor is bound with a stranger, or for a different sum, his responsibility is changed in more respects than the quality of the security. The difference, on the whole, consists in this, that in a case of merger there is a change only of the security; but, in a case of satisfaction by substitution, there is a change of the debt."

But although the intention of the parties cannot prevent the operation of a merger when a higher security is taken for a lower one, on the ground that there cannot be two distinct liabilities for *the same debt*, yet it is also undoubtedly settled that it may be shown that the higher security is taken as collateral for the payment of the lower, that is to say, that it is a new security for a new debt, intended to protect the first: *Yates v. Aston*, 4 Q. B. (45 E. C. L. R.) 196; *Ansell v. Baker*, 15 Ib. (69 E. C. L. R.) 20; *Railway Co. v. M'Namara*, 3 Exch. 627; *U. S. v. Lyman*, 1 Mas. 505; *Averill v. Loucks*, 6 Barb. 470; *Butler v. Miller*, 5 Den. 159; although the presumption where the bond is between the same parties, and for the same sum, is that the new security was taken as a satisfaction: *Frisbie v. Larned*, 21 Wend. 450; *Stewart's Appeal*, 3 W. & S. 476; *Bond v. Aitken*, 6 Ib. 165; *Butler v. Miller*, *supra*; *Price v. Moulton*, 2 Eng. L. & Eq. R. 307.

A very common instance of the operation of merger occurs in the sale of real estate, when by the acceptance of the deed which consummates the transaction the articles of agreement are annulled: *Howes v. Barker*, 3 Johns. 506; *Houghtaling v. Lewis*, 10 Johns. 299; *Wilson v. M'Neal*, 10 Watts, 427; *Creigh v. Beelin*, 1 W. & S. 83; *Williams v. Morgan*, 15 Q. B. (69 E. C. L. R.) 782; unless in case of fraud or mistake: *Lee v. Dean*, 3 Whart. 316; *Jenks v. Fritz*, 7 W. & S. 201; or unless part of the consideration should be the future performance of certain stipulations in the articles, in which case the deed may be considered not so much a merger of the original contract as a part performance of it: *Selden v. Williams*, 9 Watts, 12; *Brown v. Moorhead*, 8 S. & R. 569. In the latter case, however, it is said that to rebut the presumption that the law would otherwise make (*viz.*, that of the merger), the intention to the contrary must be clear and manifest: *Seitzinger v. Weaver*, 1 Rawle, 385.—R.

also when two out of three simple contract debtors gave a specialty security for the debt, it was held, that the simple contract liability was not merged in the specialty, and that an action lay on the simple contract (*q*).

Another peculiar incident to a contract by deed is, that its obligation cannot be got rid of by any matter of inferior degree: thus, a verbal license *will not [*31] exempt a man from liability for breach of his covenant (*r*). Thus in *West v. Blakeway* (*s*), a tenant had covenanted not to remove a greenhouse, and it was held no defence for him against an action for so doing, that he had his landlord's subsequent permission so to do, that permission not being shown to have been under seal. "It is a well-known rule of law," said the Lord Chief Justice, "that *unumquodque ligamen dissolvitur eodem ligamine quo et ligatur*. This is so well established," continued his Lordship, "that it appears to me unnecessary to refer to cases. I will mention only *Rogers v. Payne* (*t*), which was an action of covenant for the non-payment of money; the defendant pleaded a parol discharge in satisfaction of all demands. It was held upon demurrer that the covenant could not be discharged without deed, and *Blake's Case* (*u*) was cited."¹

(*q*) *Sharp v. Gibbs*, C. P. 12 W. R. 711.

(*r*) See *Cocks v. Nash*, 9 Bing. (23 E. C. L. R.) 341; *Wood v. Leadbitter*, 13 M. & W. 838.

(*s*) 2 M. & Gr. (40 E. C. L. R.) 729; *Doe dem. Muston v. Gladwin*, 6 Q. B. (51 E. C. L. R.) 953.

(*t*) 2 Wils. 376.

(*u*) 6 Co. Rep. 43 b. See also *Harris v. Goodwyn*, 2 M. & Gr. (40 E. C. L. R.) 405. See *Nash v. Armstrong*, 30 L. J. (C. P.) 286.

¹ *West v. Blakeway* must be considered as laying down a more rigid rule than has been observed on this side of the Atlantic, where there have been many decisions to the effect that a parol dispensation with the performance of a sealed contract is valid, and similar in its effects to a license to exercise dominion over land, which, while unrevoked, is a justification for any acts done under its authority), upon the ground that although the contract itself

It is another advantage of a contract by deed over a simple contract (*x*), that although, as is well known, a chose in action is not assignable at common law (*y*), independently of the Judicature Act, *1873 (36 & [*32] 37 Vict. c. 66), yet, where the contract is one between landlord and tenant, and is such as in its nature to affect directly the estates of either of them, which in law is called running with the land (*z*), the benefit and

(*x*) *Standen v. Christmas*, 16 L. J. (Q. B.) 265; 10 Q. B. (59 E. C. L. R.) 135; *Brydges v. Lewis*, 3 Q. B. (43 E. C. L. R.) 603.

(*y*) Com. Dig. Assignment, C. 1, Ib. Grant, D. But see now 36 & 37 Vict. c. 66, s. 25, sub-s. (6), and *post*, Lect. VII. "Assignment of Contracts."

(*z*) *Spencer's Case*, 5 Co. Rep. 16; 1 Smith, L. C. 68, 8th ed.; *Vernon v. Smith*, 5 B. & Ald. (7 E. C. L. R.) 1.

cannot be dissolved unless by an instrument of equal solemnity as that creating it, yet that the rights proceeding from it may be varied or released by parol: *United States v. Howell*, 4 Wash. C. C. 620; *Fleming v. Gilbert*, 3 Johns. 528; *Langworthy v. Smith*, 2 Wend. 587; *Dearborn v. Cross*, 7 Cow. 48; *Leavitt v. Savage*, 16 Me. 72; *Marshall v. Craig*, 1 Bibb, 379; and such was the view taken in the earlier English cases: 1 Roll. Abr. 453, pl. 5; *Ib.* 455, pl. 1; Year Book, 2 Hen. VI, 37; *Ratcliff v. Pemberton*, 1 Esp. 35; *Blackwell v. Nash*, 1 Str. 535; *Jones v. Barkley*, Dougl. 684; in which case it was held that a tender of performance and waiver of it (the evidence of which must always rest in parol) were equivalent to actual performance. In *Cordwent v. Hunt*, 8 Taunt. 596, it was, however, held that in an action of covenant for not erecting a threshing-mill, it was no defence, that the omission to do so was at the special request of the plaintiff. This case was followed by *West v. Blakeway*, *supra*, where the defendant had, in a lease executed to him by the plaintiff's testator, covenanted not to remove any buildings erected on the premises during the term, and the breach alleged was that he had permitted the removal of a greenhouse, to which the defendant pleaded that after the execution of the lease, the term had been assigned to a third person, to whom the plaintiff's testator promised that if he would erect the greenhouse, he should have liberty to remove it at the expiration of the lease. Under these circumstances, as has been well observed of this case, there can be no question that, upon familiar principles, a parol license to remove the greenhouse would have protected a party in so doing, if the greenhouse had at the time of the license been in actual existence, and in the possession of the lessor; and the effect of the decision was therefore to deny the operation of such a license, as a protection, while the title to the greenhouse rested on an executory contract, thereby holding that the right of a party can be greater under a contract while yet executory than after it had passed into execution and conferred an actual title: 2 American Lead. Cas. 758, License. Such a course of decision, however, has not, as we have seen, been followed in this country.—R.

the burthen of that contract when under seal will, without having regard to the last mentioned statute, if the estate of either is assigned, pass with the reversion or the term to the new landlord or to the new tenant. This is partly by force of the common law, and partly by force of the stat. 32 Hen. VIII. c. 34 (a), an Act passed shortly after the dissolution of the monasteries, and rendered necessary thereby. For, as by the common law, neither the benefit nor the burthen of a contract could in general be transferred by assignment, it became necessary, when so many reversions of estates held by farmers and tenants, for lives or years, were alienated, to give to the purchasers or alienees the same rights against the farmers or tenants as the lessors had; and the legislature naturally and equitably went on to give corresponding rights to the farmers and tenants.

Again, a deed formerly had this further advantage of a simple contract, that, in case of the death of the party bound by it, it charged his heirs (if the deceased bound his heirs by using words for *that purpose in the deed) to the extent of any assets that might [*33] have descended to them (b).

You will find the nature of the heir's liability fully explained in the notes to *Jefferson v. Morton* (c). If, indeed, the debtor had devised the land away, instead of allowing it to descend to his heir, the creditor could not at common law have sued the devisee. However, by stat. 3 Wm. III. c. 14, usually called the Statute of Fraudulent Devises, the devisee was made liable as well as the heir. But, as this statute did not provide for the case of there being no heir, the land in that event going to the lord by escheat, if there was no devisee, or to the

(a) *Thursby v. Plant*, 1 Wms. Saund. 240.

(b) *Com. Dig. Covenant*, C. 2; *Ib. Assets*, A.

(c) 2 Wms. Saund. 6.

devisee if one was designated by the will, a distinction which it is sometimes important to observe (*d*), it was repealed, and its enactments repeated, making the devisee in such case liable, with several other improvements, by stat. 1 Wm. IV. c. 47, usually called Sir Edward Sugden's Act (*e*).

While on this subject, it may as well be mentioned, that, although the right of bringing an action at common law against the heir or devisee was limited to specialty creditors, yet, by stat. *3 & 4 Wm. IV. c. 104, [*34] the simple contract creditors had a remedy against the real estate of the deceased in equity, as they now have in the Chancery Division of the High Court (*f*). Their claims, however, were, by the express enactment of the statute, postponed to those of creditors by deed in which the heirs of the deceased were mentioned. And by this Act lands escheating for want of heirs are made assets. (*g*).

In the administration of the personal effects, also, the speciality creditors used to have, as you are probably aware, a priority over those by simple contract (*h*).¹

These advantages, however, are now no longer given

(*d*) *Hunting v. Sheldrake*, 9 M. & W. 256.

(*e*) See *Hunting v. Sheldrake*, 9 M. & W. 263. On the construction of statute 3 W. & M. c. 14, you may see *Farley v. Briant*, 3 A. & E. (30 E.C. L R.) 839.

(*f*) 36 & 37 Vict. c. 66 (Judicature Act, 1873), s. 34.

(*g*) *Evans v. Brown*, 5 Beav. 114; *Cummins v. Cummins*, 3 J. & L. 64.

(*h*) *Pinchorns' Case*, 9 Co. Rep. 88 b.

¹ A striking difference has existed between the course of legislation on the different sides of the Atlantic, with respect to the liability of estates of decedents for the payment of their debts, and although the rules in the different States must necessarily be local in their application, yet it may, in general, be said that in this country lands are liable for the debts of a decedent, whether due by matter of record, specialty, or simple contract, and that in the two latter cases, although they create no lien during the debtor's life, yet by his death their quality is changed, and they become liens on the real estate, which descends to the heir, or passes to the devisee, subject to the payment of the debts of the ancestor, according to the local laws of the State.—R.

by a deed, either in the case of realty or personalty; for, by 32 & 33 Vict. c. 46, sec. 1, in the administration of the estate of every person dying on or after the 1st of January, 1870, the specialty and simple contract creditors stand in equal degree; but by the proviso of that section the Act is not to affect any lien charge or other security which any creditor may hold or be entitled to for the payment of his debts.

The occasions on which for the most part a deed is necessary must now be mentioned. It will be recollected that all property is in its nature *tangible or intangible, or, as it is called in law, corporeal [*35] or incorporeal. Real property of the corporeal kind being capable of actual delivery may, by the common law, be aliened or transferred by delivery alone without deed, and is therefore said to lie in livery; while that of the incorporeal kind, being incapable of delivery, requires some other mode to be used for authenticating its alienation or transfer, which mode is a deed (*i*), and therefore such property is said to lie in grant (*k*). Although the older authorities speak of incorporeal *inheritances*, there is no doubt that the principle does not depend on the quantity of interest granted or transferred, but on the nature of the subject-matter: a right of common, for instance, which is a profit *à prendre*, or a right of way, which is an easement or right in nature of an easement, can no more be granted or conveyed for life or years without a deed than in fee simple (*l*).

(*i*) Co. Litt. 9 a; *Hewlins v. Shippam*, 3 B. & C. (10 E. C. L. R.) 221; Bac. Abr., Grant, E.

(*k*) *Ib*.; 2 Bl. Com. 310 ad 317; *Shep. Touch.* 228-230; *Sugd. Vend.* 125; *Rann v. Hughes*, 7 T. R. 350, n.

(*l*) *Wood v. Leadbitter*, 13 M. & W. 838; *Perry v. Fitzhowe*, 8 Q. B. (55 E. C. L. R.) 757; *Mayfield v. Robinson*, 7 Q. B. (53 E. C. L. R.) 486; *Worsley v. South Devon Railway*, 20 L. J. (Q. B.) 254; 16 Q. B. (71 E. C. L. R.) 539; *Taplin v. Florence*, 20 L. J. (C. P.) 137; 10 C. B. (70 E. C. L. R.) 744; *Hewitt v. Isham*, 21 L. J. (Ex.) 35; 7 Ex. 77.

Thus, in *Wood v. Leadbitter*, just cited, a ticket of admission to the Grand Stand at Doncaster to see the races, issued by the steward, and for which the [*36] *holder had paid a guinea, was held, not being under seal, to convey to him no right to be there, and no remedy for having been put out. For the transfer, therefore, of incorporeal property, a deed is necessary.

As a general rule, chattels real and personal of tangible or corporeal natures may, at common law, be granted without deed (*m*). And, although an estate of inheritance or freehold cannot be granted upon condition without deed (*n*), yet a chattel, real or personal, may be so granted by mere parol (*o*).

There is also a great difference between the effect of a gift of chattels by mere word of mouth, and a gift of chattels by deed. In the former case, after the gift and before something has been done or said by the donee to show his acceptance of the thing given, the gift is revocable (*p*). But if the gift be by deed, it vests in the donee upon the execution of the deed, and is irrevocable by the donor until it is actually disclaimed by the donee. After such execution, and before such disclaimer, the estate is in the donee without any actual delivery of the chattel given (*q*).

[*37] *It is, however, necessary to bear in mind that the common law has been much altered in these respects by stat. 8 & 9 Vict. c. 106, s. 3, by which feoffments, partitions, exchanges, leases required by law to be in writing, assignments of chattel interests, and

(*m*) *Shep. Touch.* 231; *Bac. Abr.*, *Grant*, E.

(*n*) *Litt.* 365.

(*o*) *Ib.*; *Reeves v. Capper*, 5 Bing. N. C. (35 E. C. L. R.) 136; *Flory v. Denny*, 21 L. J. (Ex.) 223; 7 Ex. 581.

(*p*) 2 Rolle's Abr. 62; 14 Vin. Abr. 123.

(*q*) *Perkins' Grant*, 57; *Com. Dig. Biens.* 52; 2 M. & G. 691, note a; *Siggers v. Evans*, 24 L. J. (Q. B.) 305; 5 E. & B. (85 E. C. L. R.) 367.

surrenders in writing of all interests in tenements and hereditaments not being such as might have been created without writing, made after the 1st of October, 1845, with some exceptions unimportant for our present purpose, are void at law, unless made by deed.

A deed is also necessary for authorizing an agent to execute a deed for another (*r*).¹ It is also, as will hereafter appear, in general necessary to a contract by a corporation.

Patents for inventions which have now become a very important class of property, seem by the stat. 46 & 47 Vict. c. 57, to be assignable only by deed or will (*s*), and such assignment must be perfected by entry on the register of proprietors (*t*). But it is remarkable, and worthy of attention, that a copyright in any book within the Copyright Act, 5 & 6 Vict. c. 45, may under sect. 13 of that Act, be assigned by entry made in the Book of Registry kept at Stationers' Hall of the assignment, and such assignment so entered is of the same force and effect *as if it had been made by deed. A deed [*38] is rendered necessary by the Merchant Shipping Act, 1854, to make a valid transfer of a registered ship, or any share therein to a person qualified to be owner of a British ship (*u*).²

(*r*) *Steiglitz v. Egginton*, 1 Holt. N. P. C. 141; *Harrison v. Jackson*, 7 T. R. 207.

(*s*) 46 & 47 Vict. c. 57 (Patents, Designs, and Trade Marks Act, 1883), Sched. I., Form D.

(*t*) See Patents, &c., Act, 1883, s. 87.

(*u*) 17 & 18 Vict. c. 104, s. 55, Sched. E.

¹ An authority under seal is necessary to authorize an agent to execute a sealed instrument: *Rowe v. Ware*, 30 Ga. 278; *Harshaw v. M'Kesson*, 65 N. C. 688. Where an agent, having only parol authority to bind his principal, executes a contract under seal, if not essential to the validity of it, it should be regarded as mere surplusage and the contract held good as a simple contract: *Long v. Hartwell*, 34 N. J. 116. [See also note 2, p. *6.]—s.

² By the laws of the United States patents are assignable "by an instrument in writing" either as to the entire United States or any specified part thereof.

Lastly, with regard to the remedy upon a contract by deed: wherever a promise is made by deed, the performance may be enforced by an *action*. But the remedy must be pursued within twenty years (*x*), except in cases of disability by reason of infancy, coverture, lunacy, or absence beyond seas (*y*), such being the period fixed by 3 & 4 Wm. IV., c. 42, s. 3,¹ which, being later in date, though passed in the same session with 3 & 4 Wm. IV., c. 27, is held to have superseded [*39] some *inconsistent provisions contained in that statute (*z*).

Having thus touched on the general division of Con-

(*x*) But now the remedy on a covenant in a mortgage deed to pay principal and interest must be pursued within twelve years, as such a covenant has been held to come within 37 & 38 Vict. c. 57 (Real Property Limitation Act, 1874), s. 8, which imposes the limitation of twelve years on actions and suits for the recovery of money charged on land: *Sutton v. Sutton*, 22 Ch. Div. 511; 52 L. J. (Ch.) 333. And a collateral bond to secure a mortgage debt is equally within that section, so that the remedy on such a bond must be pursued within twelve years also: *Fearnside v. Flint*, 22 Ch. Div. 579; 52 L. J. (Ch.) 479. Similarly an action on a covenant to pay rent would also seem to be an action to recover rent within s. 1 of the same Act, which imposes the same limitation of twelve years on such an action. And in computing the twelve years in actions under s. 1, s. 4 enacts that no time is to be allowed for absence beyond seas.

(*y*) See last note.

(*z*) See *Strachan v. Thomas*, 12 A. & E. (40 E. C. L. R.) 536; *Paget v. Foley*, 2 Bing. N. C. (29 E. C. L. R.) 679.

Such assignment is void as to any subsequent *bond fide* purchaser or mortgagee unless recorded in the Patent Office within three months from its date: Rev. Stat. § 4898. Copyrights are assignable "by any instrument of writing," which must be recorded within sixty days of its execution in the office of the Librarian of Congress; otherwise it will be void as above: *Ib.* § 4955. No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless recorded in the office of the collector of the customs where such vessel is registered or enrolled: *Ib.* § 4192.

¹ By these statutes a positive bar is interposed to a recovery upon specialities after twenty years. Before their passage, there was only the common law presumption of payment or performance, which was liable to be rebutted by testimony, and in this country it is believed that statutes similar to that of 3 & 4 Will. IV., have not been generally enacted.—R.

tracts into those of Record, by Deed, and by Simple Contract, and explained the nature of a deed, and the formalities attending its execution—having pointed out the distinction between the absolute delivery of a deed and the conditional one of an escrow, the distinction between a deed poll and indenture, the peculiar privileges of a contract by deed, whether in respect of the consideration, the estoppel it creates, or the means by which its obligation is determined—having pointed out the occasions on which, for the most part, a deed is necessary, the remedy by which its non-performance is complained of in a Court of law, and the time of limitation within which that remedy is to be pursued, it remains to point out, in a similar manner, the peculiarities attending Simple Contracts. This will be done in the next Lecture.

THE NATURE OF SIMPLE CONTRACTS;—OF WRITTEN CONTRACTS;—PATENT AND LATENT AMBIGUITIES;—WHEN WRITING MAY BE QUALIFIED BY EVIDENCE OF USAGE;—THE STATUTE OF FRAUDS.

IN the last lecture I compressed the observations I had to make on the general nature of Contracts under Seal. I now arrive at the class denominated *Simple Contracts*, which comprises all of a degree inferior to deeds, whether they be verbal or written. For though, as I shall presently explain to you, there is, in practice, a very wide distinction between *written* and *verbal* contracts; yet *in theory* the law of England acknowledges no difference between them at all, but denominates them all by the same term, *Simple Contracts* (a). And indeed they are so far alike that they all, whether verbal or written, are subject to those marks of inferiority to contracts by deed which you heard described in the last lecture.

Thus, they do not create an estoppel. They are [*41] capable of being put an end to without the *solemnity of a deed. They form no ground of action (except an administration action in the Chancery Division) against the heir or devisee, even though he be expressly named in them; and they require a consideration to support and give them validity, though, as I shall have occasion to explain in a future lecture, there is one case, even among simple contracts, in which the consideration need not be shown, but is presumed to exist, unless its existence can be disproved. In these

(a) See *Beckham v. Drake*, 9 M. & W. 79.

respects, all simple contracts are like one another. But there are two great *practical* differences or distinctions between verbal and written contracts, which it is necessary to explain at some length to you.

The first concerns *the mode in which they are to be proved*.

The second depends on the answer to the question, *Does the subject-matter of the contract, by law, require a writing, or not?*

Now, as to the first distinction, concerning *the mode in which written contracts are to be proved*, it results from an inflexible rule of the law of evidence, that, when a contract is reduced into writing, it shall be proved by the writing, and by that only. For the written instrument, being constituted by the parties the expositor of their intentions, must, in order to effectuate that object, be the only instrument of evidence to prove their intentions. If, instead of being constituted by the parties the expositor of their intentions, a written instrument *is constituted such by a positive rule [*42] of law, the same result must follow. Thus, when, by the Statute of Frauds, operation is given to a written instrument exclusively, the object of the statute would be defeated if parol evidence were admitted in lieu of the required writing, or in any way to alter it. To admit oral evidence as a substitute for instruments to which, by reason of their superior authenticity and permanent qualities, an exclusive authority is given by the parties, would be to substitute the inferior for the superior degree of evidence, conjecture for fact, and presumption for the highest degree of legal authority. It would substitute loose recollection and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise or the law adopt (*b*), and

(*b*) Countess Rutland's Case, 5 Rep. 26. Stark. Evid. 4th ed. 651.

would introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would then be made to depend upon the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices. And where the law, for reasons of policy, requires written evidence, to admit oral testimony in its place would be to subvert the rule itself (*c*).

[*43] In applying this rule, therefore, no *contemporaneous verbal expressions must be allowed to be engrafted upon the writing, so as to alter it by adding to, or taking away from its import. You will find this principle laid down and enlarged upon in all the treatises on Evidence (*d*); indeed, there is hardly any branch of the law which has given rise to so much subtle and anxious discussion and inquiry as this single rule of the law of Evidence. The late Vice-Chancellor, Sir *James Wigram*, has, in one of the ablest treatises existing in our law libraries, discussed its applications to the single head of Devises.

You must, therefore, take care not to be misled as to the meaning of the rule; for, as may be expected, it involves nice distinctions. It would be impossible to do complete justice to these within the limits of this work; still, however, I think that I can point out their nature, so far as to give a notion of the sort of questions which are likely to arise, sufficient to prevent surprise by such questions, should they occur in practice.

Now, the rule itself, as I have said, is, that no *parol*, that is, *verbal*, evidence of what took place at the time of

(*c*) *Ib.* 649. *Marshall v. Lynn*, 6 M. & W. 109.

(*d*) See, for instance, *Starkie on Evid.* 4th ed. 648, where the application of this rule is very fully discussed; *Taylor on Evidence*, 7th ed. Part II. c. *xix*, "Admissibility of Parol Evidence to affect written instruments."

making a written contract¹ is admissible for the purpose of *contradicting* or *altering* it; for instance, if A. contract in writing with B., *to deliver him 100 [*44] quarters of wheat within three months, at so much per quarter, no evidence would be admissible to show that it was agreed, at the time, that the wheat should be delivered only in case of the arrival of a ship which the vendor expected from Odessa with wheat on board; for that would be, by parol evidence, to turn an absolute written contract into a conditional one (e). So, if a promissory note or bill of exchange (which, not being under seal, is, you must be aware, a simple contract), were made payable on one day, verbal evidence could not be admitted to show that it was meant to be payable upon another (f). So also where a written contract for the sale of goods did not specify any time for delivering them, the vendor was not allowed to give evidence that at the time of forming the contract it was made a condition of the sale, that the purchaser should immediately take them away (g). In like manner, where the written

(e) See *Wallis v. Littell*, 31 L. J. (C. P.) 100.

(f) See *Free v. Hawkins*, 8 Taunt. (4 E. C. L. R.) 92. For other examples of the application of the same principle in the case of Bills of Exchange and Promissory Notes, see also *Hoare v. Graham*, 3 Camp. 57; *Hogg v. Snaith*, 1 Taunt. 347; *Moseley v. Hanford*, 10 B. & C. (21 E. C. L. R.) 729; *Foster v. Jolly*, 1 C. M. & R. 703; *Adams v. Wordley*, 1 M. & W. 374; *Brown v. Langley*, 4 M. & G. (43 E. C. L. R.) 466; *Besant v. Cross*, 20 L. J. (C. P.) 173; 10 C. B. (70 E. C. L. R.) 895; *Abrey v. Crux*, L. R. 5 C. P. 37; 39 L. J. (C. P.) 9.

(g) *Greaves v. Ashlin*, 3 Camp. 426.

¹ These rules of course apply exclusively to written and not parol contracts. An illustration of this occurred in the case of an auctioneer, who, at the time of a sale, verbally declared a variation from the printed catalogue; namely, that goods stated therein to be silver were only plated, and so sold them; the actual contract being a parol one, evidence of the parol statement was held admissible to explain it: *Eden v. Blake*, 13 M. & W. 614; but if the auctioneer had signed an agreement which referred to or formed part of the unaltered catalogue, then his parol declaration of the alteration could not be given in evidence, as it would vary a written contract: *Shelton v. Livius*, 2 C. & J. 411.—s.

[*45] contract mentioned no time for *payment, and where, consequently, the law implies the term of immediate payment, the Court held this to be the meaning of the written contract, and would not allow it to be proved that by the usual course of dealing between the parties, six months' credit was to be given (*h*). A defendant bargained by parol with the plaintiff, who was a baker, to supply him with flour of the same quality as that which he supplied to another customer, one M.; and the defendant sent the plaintiff as a note of the contract the following memorandum, signed by himself: "Sold to Mr. H. (the plaintiff) 25 sacks whites X S, at 68s. per sack net," omitting to state that the quality should be the same as that supplied to M.; and afterwards delivered flour corresponding to the note. The flour being inferior to that supplied to M., the plaintiff sued him for his breach of contract. But the Court of Common Pleas considered that parol evidence was not admissible to show that the plaintiff had bargained for other flour than that mentioned in the written note. "The contract," said *Maule, J.*, "whatever it was, was reduced into writing, and when that is so we must look at the writing and at nothing else, even though terms previously agreed upon by the contracting parties be omitted from it" (*i*). And *as verbal evidence [*46] of what took place at the time of making a written contract cannot be given to show that the meaning of it is different from what its words import, so neither can evidence that the parties *have acted* upon the supposition of its being different have that effect (*j*).¹

(*h*) *Ford v. Yates*, 2 M. & G. 549. See per Parke, B., 2 Ex. 99.

(*i*) *Harnor v. Groves*, 24 L. J. (C. P.) 53; 15 C. B. (80 E. C. L. R.) 667; *Hotson v. Browne*, 30 L. J. (C. P.) 106.

(*j*) *Giraud v. Richmond*, 15 L. J. (C. P.) 180; 2 C. B. (52 E. C. L. R.) 835, *S. C.*

¹ A vast number of authorities upon this much discussed rule of evidence

But though you cannot be allowed to show that the meaning of a written contract was varied *at the time of*

will be found in the digests and elementary treatises, among which may be particularly noticed the notes of Messrs. Cowen and Hill, to the American edition of Phillips on Evidence, and the fifteenth chapter of Professor Greenleaf's treatise on that subject. A few only of the instances of the application or non-application of the rule can be noticed here. It has been enforced in the *exclusion* of evidence to show that a signature in one's own name was intended to be merely as agent: *Stackpole v. Arnold*, 11 Mass. 27; *Hancock v. Fairfield*, 30 Me. 299; that a written agreement to deliver wheat to A. was modified by a parol direction to deliver it to B.: *Wolfe v. Myers*, 3 Sand. 7; *Babcock v. May*, 4 Hamm. 334; that a written agreement for the purchase of land, whereby the purchaser was not to cut timber, was varied by a parol license to cut it: *Pierrepoint v. Barnard*, 5 Barb. 364; that a check purporting to be for so much money was designed to be payable in the notes of a certain bank: *Pack v. Thomas*, 13 Sm. & M. 11; or on a contingency: *Moseley v. Hanford*, 10 B. & C. (21 E. C. L. R.) 729; *Cunningham v. Wardell*, 3 Fair. 466; *Erwin v. Saunders*, 1 Cow. 249; that a particular ship was verbally excepted from a policy of insurance on the fleet to which she belonged: *Weston v. Emes*, 1 Taunt. 115; that goods to be stowed under deck were verbally allowed to be stowed on deck: *Creery v. Holly*, 14 Wend. 26 (it would have been different had the evidence been to prove a *custom* of storage in that manner: *Baxter v. Leland*, 1 Blatch. 526; see *infra*, note to page *56). The rule, however, does not exclude the testimony of *experts* to aid in the reading of the instrument, or to explain a local or technical meaning: *Wigram on Wills*, 48; *Sheldon v. Benham*, 4 Hill, 129; *Smith v. Wilson*, 3 B. & Ad. (23 E. C. L. R.) 728; *Clayton v. Gregson*, 5 Ad. & El. (31 E. C. L. R.) 302; *The King v. Mashiter*, 6 Ib. (33 E. C. L. R.) 153; *Peisch v. Dickson*, 1 Mason, 11; unless, indeed, the words have a known legal meaning: *Frith v. Barker*, 2 Johns. 335. Nor does it exclude the admission of the contemporaneous *writings* relating to the subject-matter: *Bowerbank v. Monteiro*, 4 Taunt. 846; *Hunt v. Livermore*, 5 Pick. 395; *Bell v. Bruen*, 1 How. 169; *Thomas v. Austin*, 4 Barb. 265; nor evidence to show the circumstances surrounding the parties at the time: *Haigh v. Brooks*, 10 Ad. & Ell. (37 E. C. L. R.) 309; *Goldshede v. Swan*, 1 Exch. 154; *Bainbridge v. Wade*, 16 Q. B. (71 E. C. L. R.) 98; *Smith v. Bell*, 6 Pet. 75; *Wooster v. Butler*, 13 Conn. 309; *Knight v. New England Worsted Co.*, 2 Cush. 271-283; *Lowry v. Adams*, 22 Vt. 160; for all this, it is said, tends to *explain*, and not to contradict the writing. And it is obvious that evidence is admissible to show that the writing never was of any validity, as by reason of fraud, illegality, duress, incapacity of parties, &c., for those grounds, as has been shown in the preceding chapter, vitiate the contract *ab initio*, and to exclude evidence of this, would be to promote and not to repress injustice.

But upon the ground that parol evidence is admissible to explain in cases of *fraud*, the courts of Pennsylvania have gone very far, and have in effect taken the position that when the written contract has been entered into with the understanding that it is to be used in a particular way, or with a particular

making it, by words merely spoken, there are some cases in which you may show that it was *subsequently* so

qualification, it is a fraud to violate this understanding. And hence many cases have sanctioned the admission of evidence to show what was the understanding at the time the contract was made. "If the rule is," it was said, in *Bollinger v. Eckert*, 16 S. & R. 424, "that parol evidence is admissible to correct mistake or fraud, and if the real contract of the parties is not expressed in the writing, this must arise from mistake or fraud. We seem now to have settled down in this; whatever material to the contract was expressed and agreed to when the bargain was concluded and the article drawing, may, if not expressed in the article, be proved by parol." "Ever since the case of *Hurst v. Kirkbride*, cited in 1 Binn. 616," it was said in *Oliver v. Oliver*, 4 Rawle, 141, "it has been the practice to receive parol evidence of what passed at the time of the execution of deeds, or at and before the execution. When the fairness of the transaction is impeached, it is immaterial whether the party intended a fraud at the time of the contract, or whether the fraud consists in the fraudulent use of the instrument: *Hultz v. Wright*, 16 S. & R. 345; *Lyon v. Huntington Bank*, 14 Ib. 283; *Thompson v. White*, 1 Dall. 424, are of this description;" and many other cases have, while regretting the extent of the innovation, followed it: *Partridge v. Clarke*, 4 Pa. St. 166; *Renshaw v. Gans*, 7 Ib. 119; *Rearick v. Swinehart*, 11 Ib. 238. But in a somewhat later case on the subject, *Rearick's Executors v. Rearick*, 15 Ib. 66, the Court evinced the strongest disposition to sanction the admission only of *contemporaneous* evidence, and to apply the strict rule in the exclusion of parol statements occurring *previously* to the transaction. "In the somewhat unsteady course of decision upon this vexed point of evidence," said Bell, J., who delivered the opinion of the Court, "if any principle has been adhered to with tenacity, it is, that oral proof to vary or affect a written instrument must be confined to what occurred at the execution of it: *Bollinger v. Eckert*, 16 S. & R. 424; *Stine v. Sherk*, 1 W. & S. 195. Even thus restricted, it is acknowledged to be full of danger. Were the door opened still wider for the admission of all the loose dicta of the parties, running, it might be, as in this instance, through a long course of years, the flood of evil would become so great as to sweep before it every barrier of confidence and safety, which human forethought, springing from experience, is so sedulous to raise against the treachery of memory and the falsehood of men. To avoid, therefore, what would really be a social calamity, it is recognized as a settled maxim, that oral evidence of an agreement or understanding between parties to a deed or other written instrument, entertained before its execution, shall not be heard to vary or materially affect it: *Cozens v. Stevenson*, 5 S. & R. 421; *Gilpins v. Consequa*, 1 Pet. U. C. 85; s. c. 3 Wash. C. C. 184; *M'Kennan v. Henderson*, 1 P. & W. 417. Accordingly, the settled rule is, that when a contract has been reduced to writing, it is understood as expressing the final conclusions of the contracting parties, and fully accepted as merging all prior negotiations and understandings, whether agreeing or inconsistent with it: *Lighty v. Shorb*, 3 P. & W. 450; *Monongahela Nav. Co. v. Fenlon*, 4 W. & S. 207, 209. If any dicta or even decisions in hostility to this axiom are to be found, they must be ascribed to

varied. These are cases in which the contract, although written, is of a description which is not required by law

the strong desire we are all apt to be swayed by, to defeat some strongly suspected fraud in the particular case. But these occasional aberrations but lead to the more emphatic reannunciation of a principle found to be essential to the maintenance of that certainty in human dealings, without which commerce must degenerate into chicanery, and trade become but another name for trick."

The line of decision taken in Pennsylvania admitting such evidence on the ground of fraud has not, it is believed, been generally observed elsewhere, and in a note to *Woolam v. Hearn*, 2 White's Equity Cases, 561, Am. ed., the student will find the authorities collected and commented on.—R.

When a contract to do certain work is put in writing, and no time fixed for the completion of the work, or the payment of the same, the inference of law is, that the work is to be paid for when the labor is done; and an action for labor and service cannot be sustained therefor, until the work is completed or the contract in some legal way terminated. Parol evidence, showing a verbal agreement as to the time of payment, made when the contract was signed, cannot be admitted: *Thompson v. Phelan*, 22 N. H. 339. See to the same effect, *Whitney v. Lowell*, 33 Me. 318; *Conant v. Dewey*, 21 N. H. 353; *Railsbuck v. Turnpike Co.*, 2 Ind. 656; *Norton v. Coons*, 6 N. Y. 33. A mere receipt for money, or other things, it has always been held, may be explained or contradicted by parol: *O'Brien v. Gilchrist*, 34 Me. 554; *Edgerly v. Emerson*, 23 N. H. 555; *Wadsworth v. Allcott*, 6 N. Y. 64; *Deloach v. Turner*, 6 S. C. 117; *Weatherford v. Farrar*, 18 Mo. 474; *Richardson v. Beede*, 43 Me. 161; *Street v. Hall*, 29 Vt. 165; *Henry v. Henry*, 11 Ind. 236; *Hawley v. Bader*, 15 Cal. 44; *White v. Merrell*, 32 Ill. 511. Parol evidence is admissible to vary the consideration expressed in a deed or to show that it has not been paid: *Swafford v. Whipple*, 3 Iowa, 261; *Hall v. Perry*, Ib. 579; *Holbrook v. Holbrook*, 30 Vt. 432; *Gordon v. Gordon*, 1 Metc. (Ky.) 285; *Andrews v. Andrews*, 12 Ind. 348; *Jones v. Jones*, Ib. 389; *Swope v. Forney*, 17 Ib. 385; *Speer v. Speer*, 14 N. J. Eq. 240; *Buckley's Appeal*, 48 Pa. St. 491; *Gibson v. Fifer*, 21 Tex. 260.

The following cases may be referred to as illustrative of the general rule and its many exceptions.

Prior correspondence or contemporaneous verbal agreements are not admissible to contradict, vary or materially affect the terms of a written contract: *Richardson v. Comstock*, 21 Ark. 69; *Oskaloosa College v. Stafford*, 14 Iowa, 152; *Hoxie v. Hodges*, 1 Oreg. 251; *Foy v. Blackstone*, 31 Ill. 538; *Pilmer v. Branch of State Bank*, 16 Iowa, 321; *Herndon v. Henderson*, 41 Miss. 584. In the absence of fraud or mistake of fact parol evidence is not admissible to contradict or vary the terms of a written contract, though the party has contracted under a mistake of law: *Potter v. Sewall*, 54 Me. 142; but it has been held admissible to show fraud or mistake: *Pendexter v. Carleton*, 16 N. H. 482; *Mallory v. Leach*, 35 Vt. 156; *Corlies v. Howe*, 11 Gray, 125; *Koop v. Handy*, 41 Barb. 454; *Hathaway v. Brady*, 23 Cal. 121; *Van Buskirk v. Day*, 32 Ill. 260; *Fisher v. Deibert's Adm.*, 54 Pa. St. 460; *Murray v. Duke*, 46 Cal. 644. When an indorsement of a note is in blank to show the actual

to be reduced into writing at all. Thus, if in consideration of £50, I promise to go to York on the 1st day of January, and that contract be reduced to writing, verbal evidence would not be admissible to show that it was agreed, *at the same time*, that the contractee was to be at liberty, on payment of £10, to substitute Edinburgh for York; but verbal evidence would be admissible to

agreement as to the indorsement, as that it was to be without recourse, on the ground that to fill the blank in any other manner is a fraud: *Harrison v. McKim*, 18 Iowa, 485. So to identify the subject-matter or parties: *Noonan v. Lee*, 2 Black (S. C.) 499; *Baldwin v. Bank*, 1 Wall. (S. C.) 234; *Brooks v. Aldrich*, 17 N. H. 443; *Peabody v. Brown*, 10 Gray, 45; *Morgan v. Spangler*, 14 Ohio St. 102; *Farmers' Co. v. Commercial Bank*, 15 Wis. 424; *Wing v. Gray*, 36 Vt. 261; *Aldridge v. Eshleman*, 46 Pa. St. 420; *Abbott v. Abbott*, 51 Me. 575; *Rugg v. Hale*, 40 Vt. 138; *Locke v. Rowell*, 47 N. H. 46; *Reed v. Ellis*, 68 Ill. 206; *Pope v. Machias Water Power Co.*, 52 Me. 535; *Marshall v. Gridley*, 46 Ill. 247; *Sargeant v. Solberg*, 22 Wis. 132. So to show an independent or collateral contract or part not reduced to writing: *Joannes v. Mudge*, 6 Allen, 245; *Koop v. Handy*, 41 Barb. 454; *Weber v. Kingsland*, 8 Bos. 415; *Harbold v. Kuster*, 44 Pa. St. 392; *Sessions v. Peay*, 21 Ark. 100; *Sweet v. Stevens*, 7 R. I. 375; *Van Buskirk v. Roberts*, 31 N. Y. 661; *Hahn v. Doolittle*, 18 Wis. 196; *Clarke v. Tappin*, 32 Conn. 56; *Silliman v. Tuttle*, 45 Barb. 171; *Randall v. Turner*, 17 Ohio St. 262; *Shepherd v. Wysong*, 3 W. Va. 46; *Branch v. Wilson*, 12 Fla. 543; *Perry v. Central R. R. Co.*, 5 Cold. 138; *Field v. Mann*, 42 Vt. 61; *Hubbell v. Ream*, 31 Iowa, 289; *Weaver v. Fletcher*, 27 Ark. 510; *Basshor v. Forbes*, 36 Md. 154; *Babcock v. Deford*, 14 Kan. 408; *Polk v. Anderson*, 16 Ib. 243; *Malone v. Dougherty*, 79 Pa. St. 46. To show that party signed as surety and that known to the other party: *Riley v. Gregg*, 16 Wis. 666. Where a written contract for the delivery of certain articles on demand names no place of delivery, this may be afterwards verbally agreed on by the parties: *Barker v. Barker*, 16 N. H. 333.

Receipts not under seal are always open to explanation and even to contradiction by parol evidence: *Hitt v. Slocum*, 37 Vt. 524; *Dunham v. Barnes*, 9 Allen, 352; *King v. Mitchell*, 30 Ga. 164; *Dunagan v. Dunagan*, 38 Ib. 554; *Winchester v. Grosvenor*, 44 Ill. 425; *Dolan v. Freiberg*, 4 W. Va. 101; *White v. Merrell*, 32 Ill. 511. The exception of receipts must be confined to such as are purely receipts, but not to such as are in the nature of contracts: *Stapleton v. King*, 33 Iowa, 28; *Wilson v. Derr*, 69 N. C. 137. The rule that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument is applied only in suits between the parties to the instrument and their privies: *Van Eman v. Stanchfield*, 10 Minn. 255; *Hughes v. Sandal*, 25 Tex. 162. It does not apply to cases arising between sureties; it is limited to the stipulations between the parties actually contracting with each other by the written instrument: *Thomas v. Truscott*, 53 Barb. 200; *Hussman v. Wilke*, 50 Cal. 250.—s.

show that it was agreed *next day*, that, on payment of £10, he might, if he pleased, substitute Edinburgh for York; for, as there is no rule of law which requires such a contract to be reduced into writing, it might have been made by words merely spoken, and you are therefore allowed to give parol evidence—not that the written contract did not contain the *intention of the parties at the time of drawing it up—but that [*47] they *subsequently* altered a part of it by spoken words, and so, in fact, made a *new agreement* (*k*).¹ This, you will observe, is no violation of the rule, or of the reason of it, which is that what the parties have chosen to confide to a written document, shall not be proved or varied by a kind of evidence to which, as appears by their conduct, they did not choose to trust. But though this may be done where the contract is one which the law does not require to be in writing, yet a little consideration will show that where a writing is necessary, it cannot be allowed; for, if it were, the effect of the verbal evidence would be to turn a contract which the law requires to be in writing into one partly in writing and partly in words. Therefore, in *Goss v. Lord Nugent* (*l*), it was decided that a contract for the purchase of land (which, by the Statute of Frauds, is required to be written) cannot be

(*k*) Judgment of Court in *Goss v. Lord Nugent*, 5 B. & Ad. (27 E. C. L. R.) 58.

(*l*) 5 B. & Ad. (27 E. C. L. R.) 58; *Stowell v. Robinson*, 3 Bing. N. C. (32 E. C. L. R.) 928.

¹ *Jeffery v. Walton*, 1 Stark. 213; *Wright v. Crookes*, 1 Scott's N. S. 685; *Cummings v. Arnold*, 3 Metc. 486; *Robinson v. Bachelder*, 4 N. H. 40; *Keating v. Price*, 1 Johns. Cas. 22; *Dearborn v. Cross*, 7 Cow. 50; *Frost v. Everett*, 5 Ib. 497; *Yonqua v. Nixon*, 1 Pet. C. C. 221; *Boyd v. Bertrand*, 2 Eng. 321.—s.

This new agreement, however, must be a new and distinct contract upon a new consideration: *Lippold v. Held*, 58 Mo. 213; *Hogan v. Crawford*, 31 Tex. 634; *Adler v. Friedman*, 16 Cal. 138; *Courtenay v. Fuller*, 65 Me. 153; *Malone v. Dougherty*, 79 Pa. St. 46. It must be clearly made out, the presumption being against it: *McGrann v. North Lebanon R. Co.*, 29 Pa. St. 83.

altered by a verbal arrangement, although made subsequently. The same reason would obviously apply to a contract for the sale of goods, or to any contract required by law to be in writing (*m*). "Such an agreement (*i. e.*, the one supposed to be altered by parol) must," said the Lord Chancellor (in *Emmet v. Dewhirst*), "be [*48] *proved; it cannot be proved by parol evidence, and the case affords no other; it cannot therefore be proved at all" (*n*).¹

Even in the case of an agreement required by law to be reduced into writing, parol evidence of an alteration in the writing subsequent to signature by one of the parties has been admitted under the following circumstances:—A memorandum containing proposed terms for the sale of a ship having been drawn up by the vendors' broker, but not signed, was sent to the purchaser. He made

(*m*) *Stead v. Dawber*, 10 A. & E. (37 E. C. L. R.) 57; *Marshall v. Lynn*, 6 M. & W. 109.

(*n*) *Emmet v. Dewhirst*, 21 L. J. (Ch.) 497; 3 Mac. & G. 587, 598.

¹ Both acts and words are inadmissible to vary a written contract, though the parties have acted on the verbal alteration for some years: *Giraud v. Richmond*, 15 L. J. C. P. 180. The same point was decided, on the authority of *Goss v. Lord Nugent*, in the case of *Marshall v. Lynn*, 6 M. & W. 109, with respect to a contract for the sale of goods falling within the operation of the same statute. So in *Blood v. Goodrich*, 9 Wend. 68.—R.

As shown in the foregoing notes, the rule in the text, at any rate so far as American law is concerned, is considerably modified. Though the general rule is undoubted, there are certain exceptions to it, it would appear, which are well recognized. Thus even in cases of contracts falling within the statute, subsequent oral agreements have been upheld when their effect was to discharge the contract altogether: *Robinson v. Page*, 3 Russ. 119; *Rodman v. Tilley*, 1 N. J. Eq. 320; *Goucher v. Martin*, 9 Watts, 109; *Cummings v. Arnold*, 3 Metc. 486. It has been held that only *executory* contracts as to land can be so discharged: *Goucher v. Martin*, *supra*; *Lauer v. Lee*, 42 Pa. St. 170; *Negley v. Jeffers*, 28 Ohio St. 100. It seems that mere extension of time by parol agreement is valid: cases *supra*; *McNish v. Reynolds*, 95 Pa. St. 483; *Kimball v. Goodburn*, 32 Mich. 12; *Melton v. Smith*, 65 Mo. 315; *Longfellow v. Moore*, 102 Ill. 289. As to change of *place*, see *McMurphy v. Garland*, 47 N. H. 316. The law on this whole subject is doubtful; see *Reed*, *Statute of Frauds*, Chap. xx.

certain interlineations in red ink altering the terms, and *having signed the document*, returned it the vendors' broker. The alterations were subsequently not acquiesced in by the vendors, and were struck out, and further interlineations were made by the vendors. The vendors' broker then signed the document and submitted it to the purchaser, who assented to the terms of it as it then stood. It was held that though the contract was one which was required to be in writing under the 17th sect. of the Statute of Frauds, parol evidence was admissible to show that the purchaser had so assented, inasmuch as there never had been a contract between the parties until such assent on his part; and the effect of the parol evidence was, therefore, not to vary a written contract, but merely to show what was the condition of the document when it [*49] became a contract between the parties (o).

Another celebrated distinction on this subject is, that in a written contract, or, indeed, in any other written instrument, if there be a *patent ambiguity*, it never is allowed to be explained by verbal evidence, although a *latent ambiguity* is so (p). The meaning of the expressions *patent* and *latent* with reference to this subject is as follows:—

A *patent* ambiguity is one which appears on the face of the instrument itself, and renders it ambiguous and unintelligible: as if in a will there were a *blank* left for the devisee's name (q); or as if, in the body of a bill of exchange, it appeared to have been drawn for £200, and

(o) *Stewart v. Eddowes*, L. R. 9 C. P. 311; 43 L. J. (C. P.) 204.

(p) *Bacon's Maxims*, reg. 23. See *Dodd v. Burchall*, 31 L. J. (Ex.) 364. Where, however, there is a manifest error in a document, the Courts will put a sensible meaning on it by correcting or reading the error as corrected. And there is no distinction in this case between the rules of law and equity. See *Burchell v. Clark*, 2 C. P. D. 88, 97; 46 L. J. (Q. B., etc.) 115, 120.

(q) *Hunt v. Hort*, 3 Bro. C. C. 311; *Clayton v. Lord Nugent*, 13 M. & W. 200.

in the margin the figures usually put there expressed that it was drawn for £245 (*r*). In this latter instance the Court refused to admit evidence that the words “and forty-five” had been omitted by mistake.

[*50] *A *latent* ambiguity is where the instrument itself is on the face of it intelligible enough, but a difficulty arises in ascertaining the identity of the subject-matter to which it applies, as if a devise were to *John Smith*, without further description. In that case the devise would be intelligible enough on the face of it, and if there were only one John Smith in being, no difficulty could arise. But as there are several thousands, it would be impossible to tell which of them was meant without admitting verbal evidence, which would accordingly be admitted. This would be what is called a latent ambiguity, because it would not appear on the face of the instrument, but would lie hid till evidence had been produced, showing that there were a great number of persons corresponding in name with the devisee.¹

The force and application of this rule, and the distinction between these two kinds of ambiguity, are so happily expressed and illustrated in a judgment of the Court of Exchequer, in the case of *Doe dem. Hiscocks v. Hiscocks* (*s*), that, although that judgment was given in the case of a will, it will be very useful to introduce a portion of it here. “The object in all cases,” said the Court, “is to discover the intention of the testator. The

(*r*) *Saunderson v. Piper*, 5 Bing. N. C. (35 E. C. L. R.) 425.

(*s*) 5 M. & W. 363. See *Doe d. Allen v. Allen*, 12 A. & E. (40 E. C. L. R.) 451; *Doe d. Gains v. Rouse*, 5 C. B. (57 E. C. L. R.) 422; *Grant v. Grant*, L. R. 5 C. P. 380, 727 (Ex. Ch.); 39 L. J. (C. P.) 140, 272.

¹ See on the subject of patent and latent ambiguity, *Campbell v. Johnson*, 44 Mo. 247; *Pollen v. Le Roy*, 30 N. Y. 549; *Pettit v. Shepard*, 32 N. Y. 97; *Bell v. Woodward*, 46 N. H. 315; *Piper v. True*, 36 Cal. 606 [*Aspden's Estate*, 2 Wall. Jr. 368].—s.

first *and most obvious mode of doing this is, to read his will as he has written it, and collect his intention from his words. But, as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances (*t*). To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements, and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property to which the will relates, are undoubtedly legitimate and often necessary evidence, to enable us to understand the meaning and application of his words. Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could be only explained and construed by the aid of evidence, to show the sense in which he used them, in like manner as if his will were written in cypher or in a foreign language. The habits of the testator in these particulars must *be receivable as evidence, to explain the meaning of his will. [*51]

“But there is another mode of obtaining the intention of the testator, which is, by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of his will, but either to supply some deficiency or remove some obscurity, or to give some effect to expressions that are

(*t*) See *Burgess v. Wickham*, 31 L. J. (Q. B.) 17.

unmeaning or ambiguous. Now there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in his will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors, of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used; in that case there is what Lord Bacon calls 'an equivocation,' *i. e.*, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when [*53] you know that, you *immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will."

A latent ambiguity, therefore, is where, on attempting to carry out the contract, it is found that the words used apply equally to two or more different things, and then, the latent ambiguity having been shown by evidence, further evidence is admissible to show which of them was the thing intended (*u*). Thus, where pre-

(*u*) See the judgment of *Bovill*, C. J., in *Grant v. Grant*, L. R. 5 C. P. 390; 39 L. J. (C. P.) 146.

viously to a contract for the purchase of wool being reduced into writing, a conversation had taken place between the buyer and the seller, in which the latter had said that he had a quantity of wool partly of his own clip and partly contracted to be bought of other persons, and by the contract when reduced to writing, it appeared that the defendant purchased of the plaintiff a certain quantity of wool described therein as "your wool," it was considered that evidence of the conversation was admissible to show what the parties meant by the term "your *wool" (v). "The subject-matter of the contract," said Lord *Campbell*, C. J., "was 'your wool,' and I am of opinion that when there is a contract for the sale of a specific subject-matter, parol evidence may be received to show what the nature of that subject-matter was, and that in effect may be by proving what was in the knowledge of the parties at the time of the contract being made. Now, in order to show that, it was proposed to prove the conversation between the plaintiff and the defendant, in which it was mentioned that the plaintiff had wool of his own, and also that he had contracted for the purchase of other wool. There was knowledge in both parties of what the subject-matter was. There was an offer to buy 'your wool'; that was the specific subject-matter which was to be purchased. Then is there any difficulty in admitting what passed at that conversation? I think that there is none. It is no part of the contract, and is not adding to or varying a written contract, but it is evidence which enables us to say what the contract referred to. It seems that there was a reference to the wool which was in the possession of the defendant, partly obtained

(v) *Macdonald v. Longbottom*, 1 E. & E. (102 E. C. L. R.) 977; 28 L. J. (Q. B.) 293; in Exch. Ch., 1 E. & E. (102 E. C. L. R.) 987; 29 L. J. (Q. B.) 256.

from his own flocks, and partly that which he had purchased from other people."

For the same reason, when the terms of a written [*55] *contract signed by the defendant were, "in consideration of my entering on your employ at such a salary," &c., not specifying what the employment was, evidence that the defendant being in the plaintiff's service, a vacancy in another department of his business occurred, which the defendant undertook to fill, was admitted to show that it was this vacancy to which the terms of the written contract referred (x).

There is one exception, indeed, engrafted on the rule which forbids the reception of parol evidence for the purpose of qualifying the sense of a written contract; it occurs where parties have contracted with reference to some known and established usage. In such cases the usage is sometimes allowed to be engrafted on the contract, in addition to the express written terms. When they have so contracted, the reference in their minds to the usage is similar to that reference which exists in all men's minds (when making a contract) to the general law. In the latter case they intend that where their contract is silent, their rights shall be those which the general law annexes to the stipulations which they have expressed; and in the former they intend that the rules which the usage of the place or trade annexes, shall regulate their rights in those particulars in which their agreement is silent. In both cases they can exclude the [*56] general law or the *usage by their stipulations, and, in both, are liable to the general law or to the usage where their contract does not exclude their operation (y), by showing, expressly or impliedly, that

(x) *Mumford v. Gething*, 29 L. J. (C. P.) 105.

(y) *Senior v. Armitage*, 1 Holt, N. P. (3 E. C. L. R.) 197; *Hutton v. Warren*, 1 M. & W. 466.

they did not intend to be bound by it. The notoriety of the custom makes it part of the contract. For the custom may be so universally followed in the place or trade in which the contract was made, that no one can be supposed to have contracted without looking upon it as part of his contract (z).¹

Upon such reasonings it was held, in the leading case of *Wigglesworth v. Dallison* (a), where a lease of land under seal was made for a fixed term of years, that a custom of the parish in which the land lay, that the tenant should, after the expiration of the term, have the way-going crop, was obligatory on the landlord; that custom not altering or contradicting the agreement in the case, but only superadding a right as consequential to the taking. Very similar to this was the equally leading case of *Hutton v. Warren* (b), where the plaintiff had held under a lease by deed which had expired,

(z) *Queen v. Stoke-upon-Trent*, 5 Q. B. (48 E. C. L. R.) 303.

(a) Dougl. 201; 1 Smith, L. C. 594, 8th ed.

(b) 1 M. & W. 466.

¹ A usage of trade, when adopted by the implied understanding of the parties, is as obligatory as if incorporated, provided such usage is not repugnant to nor inconsistent with the terms of the contract, and is not inconsistent with existing rules of law: *Appleman v. Fisher*, 34 Md. 540; *Lamb v. Klaus*, 30 Wis. 94; *Schenck v. Griffin*, 38 N. J. (Law) 462; *Insurance Co. v. Wright*, 1 Wall. (S. C.) 456; *Deshler v. Beers*, 32 Ill. 368; *Leonard v. Peeples*, 30 Ga. 61. Usage of a particular trade is inadmissible to affect the construction of a contract, unless notice of it can be brought home to the party against whom it is invoked: *Martin v. Maynard*, 16 N. H. 165. Evidence of custom cannot control an express contract, unless the attendant circumstances imply that the parties contracted with reference to it: *Rafert v. Scroggins*, 40 Ind. 195. Usage is not allowed to engraft on a contract any obligation inconsistent with the law: *Haskins v. Warren*, 115 Mass. 514; and see *Bindskoff v. Barrett*, 14 Iowa, 101; *Boody v. Rutland R. R. Co.*, 3 Blatch. 25; *Meaher v. Lufkin*, 21 Tex. 383; *Wallace v. Morgan*, 23 Ind. 399; *Fay v. Strawn*, 32 Ill. 295; *Bliss v. Ropes*, 9 Allen, 339; *Sturges v. Buckley*, 32 Conn. 18, 265; *Fox v. Parker*, 44 Barb. 541; *Lombardo v. Case*, 45 Ib. 95; *Overman v. Hoboken City Bank*, 30 N. J. 61; *Exchange Bank v. Cookman*, 1 West Va. 69; *Detwiler v. Green*, Ib. 109; *Lowe v. Lehman*, 15 Ohio St. 179; *Niagara Co. Bank v. Baker*, Ib. 68; *Thompson v. Riggs*, 5 Wall. (S. C.) 663; *Dodd v. Farlow*, 11 Allen, 426; *Saint v. Smith*, 1 Cold. 51; *Barnes v. Ingalls*, 39 Ala. 193.—s.

but, continuing to occupy without further stipulation, was, according to law, bound by the terms of the expired lease. There was a covenant in the lease, that he [*57] would consume on the farm *three-quarters of the hay and straw raised thereon, and on certain other property not comprised in the lease, and would leave for the landlord such of the manure thence arising as was not used upon the farm, receiving a reasonable price for it. There was also a custom of the neighborhood that the tenant of a farm should receive from the landlord or incoming tenant a reasonable allowance for seed and labor bestowed on the arable land in the last year of his tenancy, and should leave the manure for the landlord if he would purchase it. The Court considered that in this case the only difference material to the question between the covenant and the custom was that the covenant obliged the tenant to spend on the farm more than its own produce upon being paid for it, which was not incompatible with the custom, but virtually left it in its full operation.

But the Courts never admit evidence of an *usage* incompatible with the written contract; for, in the words of Mr. Baron *Alderson*, in the case of *Clarke v. Roystone* (c), “Where a stipulation is inconsistent with the custom of the country, the contract must prevail and the custom of the country must be excluded.” In these cases it appears to be simply a question whether the words of the contract themselves sufficiently disclose the full import of the contract; if so, no *custom can [*58] vary it, and no evidence of custom is admissible.

But a tenant may avail himself of a local custom to take an away-going crop after the expiration of his term under a lease, although the terms of *holding* during the continuance of it are inconsistent with the custom,

(c) 13 M. & W. 752.

if it contain no stipulations as to the mode of *quitting* (*d*). For it is evident that the rights of the landlord and tenant may be governed by the terms of the agreement during the tenancy, and by the terms of the custom immediately afterwards.¹

(*d*) Holding *v. Piggott*, 7 Bing. (20 E. C. L. R.) 465.

¹ Thus in *Coit v. Ins. Co.*, 7 Johns. 385, evidence was admitted to show that, by general understanding, the word "*roots*" in New York policies of insurance, was limited to roots perishable in their own nature, and therefore excluded sarsaparilla; and in *Astor v. Ins. Co.*, 7 Cow. 202, the usage of *furs* and *skins* was admitted to show the meaning of those words in a policy; and other instances in which usage was similarly permitted, by way of explanation, will be found in *Taylor v. Briggs*, 2 C. & P. (12 E. C. L. R.) 525; *Smith v. Wilson*, 3 B. & A. (23 E. C. L. R.) 728; *Baker v. Ludlow*, 2 Johns. Cas. 289; *Macy v. Ins. Co.*, 9 Metc. 362; *Putnam v. Tillotson*, 13 Ib. 517; *Eyre v. Ins. Co.*, 5 W. & S. 116; *Allegre v. Ins. Co.*, 6 Harr. & J. 408; *Allegre's Adm'rs v. Maryland Ins. Co.*, 2 Gill & J. 136. So, in a late case, where a vessel was libelled for freight of flour, the respondents proved that it had been damaged by being stowed in the hold on the top of moist sugar, and the libellants were permitted to show an established custom of storage in general ships from New Orleans to the northern ports—"it being, of course, well understood by the respondents that their flour would be thus shipped, unless they gave instructions to the contrary, they must be deemed to have assented to the mode of shipment;" *Baxter v. Leland*, 1 Blatch. 526. Evidence of a usage is not, however, admissible when the meaning is certain and not doubtful: *Gross v. Criss*, 3 Gratt. 262; *Macomber v. Parker*, 13 Pick. 176; *Brown v. Brown*, 8 Metc. 577; *Sleght v. Rhineland*, 1 Johns. 192, reversed on another point in 2 Ib. 531; nor where it will contradict the written contract, as where a policy was made in the usual form upon the ship, her tackle, apparel, boats, etc., evidence of usage that the underwriters never pay for the loss of boats slung on the quarter was held as inadmissible: *Blackett v. Ass. Co.*, 2 C. & J. 244; and to the same effect are *Sch. Reeside*, 2 Sum. 568; *Turney v. Wilson*, 7 Yerg. 340; *AHen v. Dykers*, 3 Hill, 593; *Hinton v. Locke*, 5 Ib. 437. And it has also been said that a usage will not be recognized in a court of law unless it be reasonable, and adapted to increase trade and promote fair dealing between the parties: *Maxcy v. Ins. Co.*, 9 Metc. 363; *Bowen v. Stoddard*, 10 Ib. 381. The student will find the cases upon this subject collected, and the distinctions carefully noticed, in the American note to *Wigglesworth v. Dallison*, 1 Smith's L. C. 928. The later cases show a disposition rather to restrain than to enlarge the introduction of such evidence: *Donnell v. Columbia Ins. Co.*, 2 Sum. 377; and under any circumstances it is said that a usage must not be proved by isolated instances, but be so certain, uniform, and notorious, that it must probably have been understood by the parties as entering into the contract: *Cope v. Dodd*, 13 Pa. St. 33; *Nichols v. De Wolf*, 1 R. I. 277.—R.

The following example relative to annexing a custom to the stipulations in a lease is also well worth observ-

When the terms of a contract are clear, evidence of usage is inadmissible to vary its effect: *George v. Bartlett*, 22 N. H. 496; *Catlin v. Smith*, 24 Vt. 85; *Wadsworth v. Alcott*, 6 N. Y. 64. In the absence of clear stipulations in contracts, usage of trade or business is admissible to show the intention of the parties: *Leach v. Beardslee*, 22 Conn. 404; *Dixon v. Dunham*, 14 Ill. 324. If it be shown or may be fairly presumed that the parties to a contract entered into it in reference to a custom existing in the city where they did business, and where they contracted, the general law must give way to the custom: *Fulton Ins. Co. v. Milner*, 23 Ala. 420; *Soutier v. Kellerman*, 18 Mo. 509. The custom must be of such extent, universality, and antiquity as to warrant the conclusion that it was known to the contracting parties, and that they made their contract with reference to it: *Dixon v. Dunham*, 14 Ill. 324; *Adams v. Otterback*, 15 How. 539. It must be uniform, known, and established, and whether it is so is a question of fact for the jury: *Farnsworth v. Chase*, 19 N. H. 534. To vary the ordinary meaning of plain words in a contract, the evidence must show a special custom, precise, definite, and universal where it exists: *Steward v. Scudder*, 24 N. J. 96. Proof of a local usage can never be received to vary the construction that the law would otherwise give to a contract, unless it is clearly proved that its existence was known to the parties, and that their contract was made with reference to it: *Wheeler v. Newbould*, 5 Duer, 29; *Martin v. Maynard*, 16 N. H. 165; *Steele v. McTyer*, 31 Ala. 667. No custom, however general, can be given in evidence to vary or control the express terms of a contract: *Caldwell v. Meek*, 17 Ill. 220; *Wheeler v. Nurse*, 20 N. H. 220. It cannot be laid down as a positive rule that more than one witness is required to prove a usage: *Partridge v. Forsyth*, 29 Ala. 200; *contra*, *Bissell v. Ryan*, 23 Ill. 566. An isolated instance is not sufficient, nor the custom of one person: *Burr v. Sickles*, 17 Ark. 428. A usage must be notorious, certain, uniform, reasonable, and legal: *Townsend v. Whitby*, 5 Harring. 55. And see *Oelricks v. Ford*, 23 How. 49; *Dalton v. Daniels*, 2 Hilt. 472; *Given v. Charron*, 15 Md. 502; *Berry v. Cooper*, 28 Ga. 543; *Shackelford v. New Orleans R. R. Co.*, 37 Miss. 202. It can be proved only by witnesses who have had actual experience of it, not by their own opinions: *Ib.* A general custom or a special custom affecting the particular locality or trade, if proved, will be the law of the contract: *Hursh v. North*, 40 Pa. St. 241. A custom of the country which sanctions any contrivance by which creditors can get more than legal interest is bad: *Greene v. Tyler*, 39 Ib. 361. When a custom is so universal and of such long standing that all men are presumed to know it, the Court will take judicial notice of it. Such is the custom of banks to allow their customers to withdraw their deposits in parcels: *Munn v. Burch*, 25 Ill. 35.

There is a strong and increasing disinclination of the courts to allow the general laws of the country to be varied by proof of local usages. Such a usage is binding only on the ground that the party sought to be charged contracted with reference to it. The evidence must be such as to clearly authorize the presumption that he had a knowledge of it. It must be of such age,

ing. A lease for seven years contained a clause "that the tenant should, during the term, consume with stock on the farm all the hay, straw, and clover grown thereon, which manure should be used on the farm; and should, in the last year of the term, leave not less than fourteen acres of land, summer fallowed, manured with a full quantity of manure, and sown in good time for sheep feed." But there was a custom in the parish that an outgoing tenant who, on coming in, had paid for the straw, was entitled to be paid for it on going out, which payment on coming in had in fact been made by the plaintiff. It was held that the provision in the lease did not prescribe anything to be done with *the straw on quitting, and that the custom bound the out- [*59] going tenant to leave the straw, and entitled him to be paid for it (e). But in a case where, by the custom of the country, the outgoing tenant was entitled to an allowance for foldage from the incoming tenant, but the lease under which the former had held specified certain payments to be made by the incoming to the outgoing tenant at the time of quitting the premises, among which there was not included any payment for foldage; the Court considered that the terms of the lease excluded the custom, and that the outgoing tenant was not entitled to any allowance in respect of foldage (f).

(e) *Muncey v. Dennis*, 26 L. J. (Ex) 66; 1 H. & N. 216.

(f) *Webb v. Plummer*, 2 B. & Ald. 746; see *Roberts v. Barker*, 1 C. & M. 808. In *Tucker v. Linger*, 21 Ch. Div. 18; 51 L. J. (Ch.) 713, a custom for the tenant to take away and sell flints, which came to the surface by ploughing, was held not inconsistent with a reservation to the lessor of "all mines and minerals, sand, quarries of stone, brickearth, and gravel pits."

such uniformity of observance, such certainty and fixedness of character, and of such notoriety, that a jury would feel clear in saying that it was known to the party sought to be affected by it: *Caldwell v. Dawson*, 4 Metc. (Ky.) 121. Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement: *Fay v. Strawn*, 32 Ill. 295; *Meaher v. Lufkin*, 21 Tex. 383.—s.

Parol evidence is admissible to annex customary incidents to written contracts, not only between landlord and tenant, but in commercial and other transactions of life in which known usages have been established.

Thus, a person employing a broker on the Stock Exchange impliedly gives him power to act in accordance with the rules there established, although he makes [*60] no mention of them in his instructions, *and although he may even be ignorant of them (*g*). But of course the rules by which he so gives the broker authority to act, must be rules existing when the contract is made, not such as are made after it is completed (*h*). Thus also an agreement in writing to serve from 11th November, 1815, to 11th November, 1817, at certain wages, expressed as follows, “We” (*i. e.*, the servants) “engage to lose no time on our account, to do our work well and behave ourselves in every respect as good servants,” was considered consistent with a usage in the particular trade for servants, under similar contracts, to have certain holidays and Sundays to themselves (*i*).

In another instance there was an agreement in writing between a master and a servant in the woollen and mohair cloth manufacture, that the plaintiff should serve the defendant therein at £150 a year, provided that if, at the end of the year, the defendant had found that

(*g*) *Sutton v. Tatham*, 10 A. & E. (37 E. C. L. R.) 27. See *Bayliffe v. Butterworth*, 1 Exch. 425; *Stewart v. Cauty*, 8 M. & W. 160; *Bayley v. Wilkins*, 7 C. B. (62 E. C. L. R.) 886; *Taylor v. Stray*, 26 L. J. (C. P.) 185, 287; 2 C. B. N. S. (89 E. C. L. R.) 175; *Smith v. Lindo*, 27 L. J. (C. P.) 335; *Grissell v. Bristowe*, L. R. 4 C. P. (Ex. Ch.) 36, reversing *Ib.* 3 C. P. 112; s. c. 37 L. J. (C. P.) 89; 38 *Ib.* 10 (Ex. Ch.). But the custom of the Stock Exchange is not binding unless reasonable and legal. *Neilson v. James*, 9 Q. B. D. 546; 51 L. J. (Q. B.) 369.

(*h*) *Westropp v. Solomon*, 8 C. B. (65 E. C. L. R.) 345.

(*i*) *R. v. Stoke-upon-Trent*, 5 Q. B. (48 E. C. L. R.) 303.

the plaintiff had done sufficient business to justify him in making up his *salary to £180, he would make him a donation of £30. A general custom in the trade was proved that either party might determine the service upon giving the other a month's notice; and the question was, whether the terms of the agreement were such as to exclude the custom. The Court clearly thought that there was not anything in it to have that effect. *Crowder, J.*, observed that the agreement did not contain any stipulation as to the time of quitting the service, or as to the term of dismissal. If it had contained such stipulations, then, according to the authorities, the custom would have been excluded, for the question in all these cases is, whether the incident which it is sought to import into the contract is consistent with the terms of the written instrument (*k*).

For the same reason, in a case where it was proved that in the tobacco trade whenever a sale of tobacco takes place, and the written contract of sale contains no stipulation on the subject of samples, but samples are actually delivered, a usage prevails to consider the vendor as agreeing that the bulk shall correspond with the sample; and the question in the case was, whether the usage was excluded by implication; the Court of Exchequer decided that the usage might be proved, annexing thereby an additional term to the written contract not inconsistent with it (*l*). One more instance of a *mercantile contract to which, although in writing, a customary usage has been annexed, will suffice. A bill of lading provided that goods should be delivered to the consignee or his assigns at Liverpool, he or they paying freight for the same, $\frac{1}{2}$ of a penny per

(*k*) *Parker v. Ibbetson*, 27 L. J. (C. P.) 236.

(*l*) *Syers v. Jonas*, 2 Ex. 111.

lb., with primage and average accustomed. The ship-owner sued the indorsee of the bill of lading, who had accepted the goods, to recover the freight and primage, when the latter was allowed to prove a custom at Liverpool by which he was entitled to a deduction of three months' discount from the freight. "In all contracts" (said *Coleridge*, J., delivering the judgment of the Court), "as to the subject-matter of which known usages prevail, parties are found to proceed upon the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding: evidence, therefore, of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten. But, in these cases, a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written [*63] *terms of a contract without altering its effect, more or less" (*m*).

The following are incidents in which the usage has been held inconsistent with the contract:—Where one carried on business as a tallow merchant, through an agent who always used his own name, but was universally known to represent the merchant, evidence of a custom in the tallow trade to reject on such contracts the principal, and to look to the broker alone for the fulfilment of the contract, was held inadmissible as being inconsistent with it (*n*). And again, where in a

(*m*) *Brown v. Byrne*, 23 L. J. (Q. B.) 313; 3 E. & B. (77 E. C. L. R.) 703.

(*n*) *Trueman v. Loder*, 11 A. & E. (39 E. C. L. R.) 589; *Magee v. Atkinson*,

policy of assurance it was expressed that the insurance on the ship should continue until she was moored twenty-four hours, and on the goods till safely landed, it was held that a usage that the risk on the goods as well as on the ship expired in twenty-four hours was inadmissible (o).

Upon the same ground, where an attorney entered into a written contract whereby he agreed to take into partnership in the business of an attorney a person who had not at that time been admitted, no time being fixed by the writing for the commencement of the partnership, it was decided that (no *time being expressly appointed) the partnership commenced [*64] from the date of the agreement; and that parol evidence could not be received to show that the agreement was not to take effect until the intended partner should be duly admitted, for such evidence would make the agreement different from that which it purported to be, namely, an agreement for a present partnership (p).

Moreover, where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties, in framing their contracts, had made use of a foreign language, which the Courts are not bound to understand. Thus, where by a charter-party, a vessel with a cargo of coals to Algiers was to be unloaded at a certain rate per day, and if detained longer the charterer was to pay so much per day from the time of the vessel being ready to

2 M. & W. 440; *Jones v. Littleddale*, 6 A. & E. (33 E. C. L. R.) 486. See also *Robinson v. Mollett*, L. R. 7 H. L. 802; 44 L. J. (C. P.) 362, reversing *Mollett v. Robinson*, L. R. 5 C. P. 646, 7 Ib. 84; 39 L. J. (C. P.) 290, 41 Ib. 65.

(o) *Parkinson v. Collier, Park on Ins.* 47.

(p) *Williams v. Jones*, 5 B. & C. (11 E. C. L. R.) 108.

unload and *in turn to deliver*, evidence was admitted to show, that, in the port of Algiers, these words had acquired a peculiar meaning (*q*). And where one of the terms of a charter-party was that the vessel should proceed to Newcastle and there be ready “in regular turns of loading,” it was decided that *the question what [*65] was loading in a reasonable time ought not to be decided without reference to the usage of the port in respect of loading, a custom in this respect having been proved to exist (*r*). Upon this principle evidence has been admitted to show that in mercantile contracts the Gulf of Finland is considered as within the Baltic, although the two seas are considered separate and distinct by geographers (*s*). So evidence is admissible to prove that, in similar contracts, the Mauritius is treated as an Indian island, although treated by geographers as African (*t*). Parol evidence has been received to show the meaning of the word “level” in a lease of coal mines (*u*); that the word London has a colloquial sense other than the City (*x*); and that, by the usage of a particular district, 1000, applied in a lease to rabbits on the land, meant 1200 (*y*). In like manner, where an auctioneer was employed to sell land under a written contract, that he should be paid 1 per cent. commission, but if the estate were not sold within two months after the day of auction, then he should be paid $\frac{1}{2}$ per cent. only; it was *held that, although this time by [*66] itself meant two months of four weeks each, yet evidence of those words being used in the auction trade

(*q*) *Robertson v. Jackson*, 2 C. B. (52 E. C. L. R.) 412.

(*r*) *Leidman v. Schultz*, 23 L. J. (C. P.) 17; 14 C. B. (78 E. C. L. R.) 38; see *Hudson v. Clementson*, 25 L. J. (C. P.) 234; 18 C. B. (86 E. C. L. R.) 213.

(*s*) *Udhe v. Walters*, 3 Camp. 16.

(*t*) *Robertson v. Money, Ry. & Mood*. 75.

(*u*) *Clayton v. Gregson*, 5 A. & E. (31 E. C. L. R.) 302.

(*x*) *Mallan v. May*, 13 M. & W. 511.

(*y*) *Smith v. Wilson*, 3 B. & Ad. (23 E. C. L. R.) 728.

in the sense of calendar months was admissible, from which the jury might find that they were so used in this contract (*z*). Where a contract was made to sell mess pork of Scott & Co., evidence was admitted to show that in the market it was understood to mean manufactured by Scott & Co. (*a*); and where a corn-merchant abroad sent instructions to his corn factor in London to sell oats on his account, evidence was admitted to show that, by the custom of the London corn trade, a factor acting under such instructions was warranted in selling in his own name (*b*). In another instance, a memorandum for a wager on a steeple-chase described the race as four miles across a country, and evidence was received to explain that across a country meant that the riders were to go over all obstructions, and not to avail themselves of an *open gate (*c*). In another case, an agreement in writing was made by an actress to perform at [*67] defendant's theatre, who agreed to engage her for three years, and to pay her so much a week. In an action for the salary, the defendant was allowed to prove that, according to uniform usage in the theatrical profession, the actress was to be paid during the theatrical season only—that is, while the theatre was open (*d*). Upon the same principle, where the defendant contracted by a charter-party to load at Trinidad a full and complete

(*z*) *Simpson v. Margitson*, 11 Q. B. (63 E. C. L. R.) 23.

(*a*) *Powell v. Horton*, 2 Bing. N. C. (29 E. C. L. R.) 668. See also *Johnson v. Baylton*, 7 Q. B. D. 438; 50 L. J. (Q. B.) 753. Here evidence, that in the iron trade there is a custom that under a contract between a manufacturer of iron plates and a customer for the supply of them, the seller must, in the absence of stipulation to the contrary, supply plates of his own make, and that the purchaser is entitled to reject other plates if tendered, though of the quality contracted for, was held admissible.

(*b*) *Johnson v. Osborne*, 11 A. & E. (39 E. C. L. R.) 549; *Graves v. Legg*, 26 L. J. (Ex.) 316; 11 Ex. 642.

(*c*) *Evans v. Pratt*, 3 M. & G. (42 E. C. L. R.) 759.

(*d*) *Grant v. Maddox*, 15 M. & W. 737; see also *Myers v. Sarl*, 3 E. & E. 306; 30 L. J. (Q. B.) 9.

cargo of sugar, molasses, or other lawful produce, and he did load as many *punchéons* of sugar and molasses as the ship would hold, he was held to have fulfilled his contract, because, by the custom of Trinidad, a full and complete cargo of sugar and molasses meant a cargo of those goods packed in punchéons (*e*). So it has been decided that a usage and custom that underwriters are not, under the ordinary form of policy, liable to general average for the jettison of timber stowed on deck, is not inconsistent with the terms of such policy, although those terms have been always held to render the insurer ordinarily liable for general average. Such custom is a reasonable *one, for the goods so stowed are not in [*68] the part of the ship where goods are usually carried, and are in more than usual peril (*f*). Again, where mining shares were sold, the written contract for the sale of which specified the times of payment, but not the time of delivery, proof of a usage among brokers in mining shares, that on contracts for the sale and purchase of such shares, the delivery of them should take place concurrently with, and at the time agreed upon for payment, and that the purchaser was not at liberty to demand the delivery of them before the time of payment, was admitted (*g*).

But, as said by Lord *Lyndhurst*, C. B., in *Blacket v. Royal Exchange Insurance Company*, although “usage may be admissible to explain what is doubtful, it is never admitted to contradict what is plain.” In this case, a policy of insurance, in the common form upon the ship—that is, “the body, tackle, apparel, ordnance, munition, *boat*, and other furniture of the ship,” was

(*e*) *Cuthbert v. Cummings*, (Ex. Ch.) 24 L. J. (Ex.) 310; 11 Ex. 405.

(*f*) *Miller v. Titherington*, 30 L. J. (Ex.) 217; 6 H. & N. 278; affirmed in Ex. Ch. 31 L. J. (Ex.) 363; 7 H. & N. 954.

(*g*) *Field v. Lelean*, 30 L. J. (Ex.) 168, in Ex. Ch.; see *Spartali v. Benecke*, 10 C. B. (70 E. C. L. R.) 212.

sought to be qualified to the exclusion of *boats slung on the ship's quarter*, by proving a usage at Lloyd's to that effect. It is obvious that this usage ought to be rejected, as it was not to explain the policy, *or to intro- [*69] duce matter upon which it was silent, but was in direct variance with the words of the policy, and in plain opposition to the language it used (*h*). A contract was made with a shipowner, by a broker, to have a full cargo for the ship, the rates of freight for which would average 40s. a ton, and at least nine cabin passengers, passage money to average £75. The contract was fulfilled as to the cabin passengers, but the average rate of freight for the goods put on board was only 32s. a ton; but several steerage passengers were shipped whose passage money made up the average earnings of the ship to 40s. a ton. Evidence that the words cargo and freight in the voyage the ship was engaged in would include steerage passengers, and the net profit arising from their passage money, was rejected (*i*). The object of extrinsic evidence in these cases is to explain terms and modes of expression which, although belonging to the English language, are not intelligible to all who understand it, but have acquired, by usage, a definite sense and meaning known amongst a particular class of persons, which can be well ascertained by means of the testimony of those who are conversant with the peculiar use of those terms. The witnesses for this purpose may be *considered as the sworn interpreters of the [*70] language of commerce, art, or the place in which the contract is written. But beyond this the principle does not extend. If plain and ordinary terms and expressions, to which an unequivocal meaning belongs,

(*h*) 2 C. & J. 244. See also *Myers v. Sarl*, 3 E. & E. 306; 30 L. J. (Q. B.) 9; *Miller v. Titherington*, 30 L. J. (Ex.) 217; *Hayton v. Irwin*, 5 C. P. D. 130.

(*i*) *Lewis v. Marshall*, 7 M. & G. (49 E. C. L. R.) 729.

which is intelligible to all, are used, that plain sense and meaning ought not to be altered by mercantile understanding and usage. To allow such alteration would be to make it legal to say one thing and mean another, and would render a writing useless. Therefore, parol evidence cannot be given to explain the meaning of the words "more or less" in a mercantile contract (*k*).¹ And

(*k*) *Cross v. Eglin*, 2 B. & Ad. (22 E. C. L. R.) 106; see *Moore v. Campbell*, 10 Ex. 323; 23 L. J. (Ex.) 310.

¹ Where qualifying words such as "more or less" or "about" are inserted in a contract it is understood that they are intended to provide for a reasonable variance one way or the other. Where a contract was made for "about 300 quarters (more or less)" of rye, 345 quarters was considered unreasonable excess: *Cross v. Eglin*, 2 B. & Ad. (22 E. C. L. R.) 106. On a contract for spars "say about 600," a tender of 496 was held a substantial compliance with the agreement. The use of the word "say" prefixed to "about" was said to indicate special care on the vendor's part to guard against an absolute promise as to quantity: *McConnell v. Murphy*, L. R. 5 P. C. 203. See *Morris v. Levison*, 1 C. P. D. 155; *McLay v. Perry*, 44 L. T. N. S. 152. The question has recently received careful consideration in the Supreme Court of the United States and the following rules were laid down: 1. Where goods are identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, and the quantity is named with the qualification of "about" or "more or less" or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. 2. When no such independent circumstances are referred to, and the engagement is to furnish goods to a certain amount, the quantity specified is material, and governs the contract. Here the addition of the qualifying words "about," "more or less" and the like is for the purpose of providing against slight and unimportant accidental variations. 3. If, however, in the last case the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significance, then the contract is to be governed by such added stipulations or conditions: *Brawley v. United States*, 96 U. S. 168. An agreement to sell "a cargo of old railroad iron, to be shipped per barque *Charles William*, . . . about 300 or 350 tons," was held to be complied with by delivery of as much as the vessel, being seaworthy and in good order, could carry, though only 227 tons: *Pembroke Iron Co. v. Parsons*, 58 Fed. Cl. 589. In *Creighton v. Comstock*, 27 Ohio St. 548 the contract was to deliver 23,000 feet of lumber; a delivery of 16,000 feet was held too large a discrepancy to be covered by the words "more or less." "More or less" or equivalent words will cover any variance not so gross as naturally to raise the presumption of fraud or radical mistake in the essence of the contract: *Noble v. Googins*, 99 Mass. 231. See also *Schickle v. Chouteau*, 10 Mo. App. 241;

where a man contracts in his own name, evidence of a custom in Liverpool to send in brokers' notes, without disclosing the principal's name, cannot be received, in order to excuse the contractor from liability as having acted as a broker merely; and *Alderson*, B., said the custom offered to be proved was a custom to violate the common law of England (*l*).

It must be borne in mind, in the application of all these rules, that evidence of words being used in a certain sense, or that certain incidents are annexed by custom in certain places and amongst certain [*71] *classes of persons, does not raise a conclusion of law that the contracting parties used the terms in those senses, or that the incident must necessarily be annexed, but it is only evidence from which a jury may draw the conclusion that such was the meaning of the parties, or such the custom or usage (*m*). It must also be borne in mind that although, in the classes of cases mentioned, evidence of usage may be received to explain the written contract, yet, when the jury have decided on the meaning of the term, it is not for them but for the Court to put a construction upon the entire contract or document (*n*).

It must also be observed, before quitting this subject,

(*l*) *Magee v. Atkinson*, 2 M. & W. (33 E. C. L. R.) 440; *Jones v. Littledale*, 6 A. & E. (33 E. C. L. R.) 486. See also *Neilson v. James*, 9 Q. B. D. 546; 51 L. J. (Q. B.) 369.

(*m*) *Clayton v. Gregson*, 5 A. & E. (31 E. C. L. R.) 302; *Smith v. Wilson*, 3 B. & Ad. (23 E. C. L. R.) 728.

(*n*) *Hutchinson v. Bowker*, 5 M. & W. 535; *Neilson v. Harford*, 8 M. & W. 806.

Baltimore Building Co. v. Smith, 54 Md. 203; *Callmeyer v. Mayor*, 83 N. Y. 116; *Kreiter v. Bomberger*, 82 Pa. St. 59. In *Clapp v. Thayer*, 112 Mass. 296, it was left to the jury to say whether a contract for "about 400 castings" was substantially complied with by delivery of 331 castings. The words "not less than" amount to a contract that the delivery shall not fall short of the specified quantity: *Leeming v. Snaith*, 16 Q. B. 275.

although it may be deduced from the very terms of the rules of which we have been treating, that if the contract itself be unusual, evidence of the usage and custom of the trade in the course of which the unusual contract arose, ought not to be received to explain it (*o*).

It seems hardly necessary to say that before the application of these rules arises, the writing to which they are to be applied must really be a complete contract. But, in fact, considerable nicety of judgment has been found requisite upon the question *whether in [*72] fact such contract does exist. Thus, where in a printed catalogue of articles to be sold by auction, a dressing case was described as having silver-fittings, but at the sale the auctioneer stated, in the defendant's hearing, that the catalogue was incorrect in describing the fittings as silver, and it would be sold as having plated fittings, but no alteration was made in the catalogue: in an action for the price, it was proposed to prove what the auctioneer had said, but this was objected to, as attempting to vary by parol a written contract. But the Court considered the evidence to be unobjectionable, as in fact the auctioneer declined to sell by the printed particulars, and the contract of sale was altogether oral (*p*). And again, where goods were ordered by letter which did not mention any time for payment, and the goods were accordingly delivered with an invoice equally silent upon that point, it was decided that parol evidence might be given that it had been stipulated by the parties that certain credit should be given which was not expired. It will be observed that in this instance the letter and the invoice together did not form a contract, which, indeed, did not exist until the goods

(*o*) *Lewis v. Marshall*, 7 M. & G. (49 E. C. L. R.) 729; *Baxter v. Nurse*, 6 M. & G. (46 E. C. L. R.) 935.

(*p*) *Eden v. Blake*, 13 M. & W. 614.

were delivered, and consequently no rule was violated in receiving evidence that credit had been stipulated for. "The documents in question," said *Alderson*, B., "are not a *contract*, but are writings *out of which, with other things, a contract is to be made. The [*73] question then is, whether the defendant has not a right to adduce evidence, not to contradict the written instruments, but to show the real contract of which the paper contains only one of the terms. In order to do that, the defendant must resort to the previous conversation" (q). This rule has been well illustrated by a more recent case, in which a tradesman having in an invoice described himself as a seller of certain goods, it was attempted to sue him for a deficient delivery and improper packing of the goods, in consequence of which they became deteriorated on a voyage. He was, it was strongly argued, estopped by his invoice from saying that he was not the seller of the goods. But he was allowed to prove that the goods were bought by the plaintiffs from another person, and were included by the defendant in his invoice at the plaintiffs' request, and for their convenience, for the purpose of enabling them to pay the price with greater facility. "No doubt," said the Chief Baron, "an invoice is in some cases very strong, and the strongest possible, evidence of a contract. But here the actual contract was made before the invoice was contemplated, and therefore it would not alter the original terms of the contract. In many cases it may be part of the *contract, but here the actual contract was a verbal one" (r). [*74]

The other point to which I alluded, as constituting

(q) *Lockett v. Nicklin*, 2 Ex. 93; *Stones v. Dowler*, 29 L. J. (Ex.) 122. See *Jeffery v. Walton*, 1 Stark. (2 E. C. L. R.) 267.

(r) *Holding v. Elliott*, 29 L. J. (Ex.) 134. See also *Malpas v. London & S. W. Rail. Co.*, L. R. 1 C. P. 336; 35 L. J. (C. P.) 166, commenting on *Jeffery v. Walton*, 1 Stark. (2 E. C. L. R.) 267.

an important practical distinction between simple contracts by mere words and simple contracts in writing (*s*) is, that there are several matters, which, although they are capable of becoming the subjects of *Simple Contract*, cannot, nevertheless, be contracted for without *writing*, so as to give either party a right of action on such contract.

By far the most important class of contracts subject to this observation are those falling within the enactments of the *Statute of Frauds*. And these are of such very constant recurrence in practice, that it will be right to devote some time to their consideration.

The Statute of Frauds was passed in the twenty-ninth year of the reign of Charles II., and is the 3d cap. of the statute-book of that year. It is said to have been the joint production of Sir *Matthew Hale*, Lord Keeper *Guilford*, and Sir *Leoline Jenkins*, an eminent civilian. The great Lord *Nottingham* used to say of it, "*that every line was worth a subsidy*,"¹ and it might now be said with truth, that every line has *cost* a subsidy, for it is universally admitted that no *enactment of any [*75] legislature ever became the subject of so much litigation. Every line, and almost every word of it has

(*s*) See p. *41.

¹ But in Lord Nottingham's MS. report of the case of *Ash v. Abdy* (1678), printed in 3 Swanst. 644, he remarks: "And I said that I had some reason to know the meaning of this law, for it had its first rise from me, who brought the bill into the Lords' House, though it afterwards received some additions and improvements from the judges and civilians." In Gilbert's Rep. in Eq. 171, "Sir Matthew Hale and Sir Leoline Jenkins, who prepared this statute," are referred to, but Lord Mansfield, in *Windham v. Chetwynd*, 1 Burr. 418, doubted Lord Hale's authorship of the statute, as "it was not passed till after his death, and was brought in, in the common way, and not upon any reference to the judges;" and Lord Campbell, in his *Lives of the Chancellors*, refers to the statute as deserving more praise for its general design than for the manner in which it was executed: vol. 3, p. 418.—R.

For a fuller account of this famous statute and of its application or adoption in the British Colonies, see Reed, *Statute of Frauds*, chap. I.

been the subject of anxious discussion, resulting from the circumstance that the matters which its provisions regulate are those which are of everyday occurrence in the course of our transactions with one another.¹

The chief object of passing the statute was, to prevent the facility to frauds, and the temptation to perjury, held out by the enforcement of obligations depending for their evidence upon the unassisted memory of witnesses. How great this temptation and facility in their own nature are, is obvious; and, accordingly, the statute, in the 1st section, declares its own enactment to be “for the prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury;” and then it goes on to provide for various cases, in which it was apprehended that such practices were most likely to occur. The 1st of the twenty-five sections of which it consists is levelled at *parol* conveyances of land, and contains the celebrated enactment, of which you have doubtless often heard, that they shall create estates at will only. The 2d section excepts from this enactment the case of leases not exceeding three years from the making thereof, and reserving two-thirds of the annual value as rent.

The 3d section forbids *parol* assignments, grants, or surrenders; the 5th is levelled at unattested *devises; the 6th at secret revocations of devises; the 7th at *parol* declarations of trust; the 19th [*76] and 20th against *nuncupative* wills of personalty; and the 21st against verbal alterations in written wills.

But the two sections which mainly affect *contracts*,

¹ The defence of the Statute of Frauds is personal, and can only be relied on by the parties or their privies: *Chicago Dock Co. v. Kinzie*, 49 Ill. 289. Contracts within the Statute of Frauds are not illegal, unless put in writing; but only not capable of being enforced—an immunity which the defendant on the trial may waive: *Montgomery v. Edwards*, 46 Vt. 151.—s.

and which, consequently, are chiefly important to the subject of this Lecture, are the 4th and 17th.

The 4th section enacts—"That *no action* shall be brought to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The contracts provided for by this section are, therefore, as you will have observed—

1st. *Promises by an executor or administrator to answer damages out of his own estate.*

[*77] *2d. *Promises to answer for the debt, default, or miscarriage of another person.*

3d. *Agreements made in consideration of marriage.*

4th. *Contracts or sales of lands, tenements, or hereditaments, or any interest in or concerning them.*

5th. *Agreements not to be performed within the space of a year after the making thereof.*

The latter part of the section applies equally to each of these five sorts of contract, which are equally prohibited from being made the subject-matter of action, unless the *agreement* or some *note* or *memorandum* of it shall be in writing, signed by the party to be charged or some person thereunto by him lawfully authorized.

Now, it has been decided—and the decision you will observe was (*t*) equally applicable to each of the five descriptions of contract—that in consequence of the introduction of the word “*agreement*,” the *consideration* as well as the *promise* must appear in writing. That was settled by the well-known cases of *Wain v. Warlters* (*u*), *Saunders v. Wakefield* (*x*), and *Jenkins v. Reynolds* (*y*). For, the word *agreement*, comprehending what is to be done on both sides, comprehends of course the *consideration* for the promise as well as the *promise* itself. The judgment of Lord *Ellenborough*, in *Wain v.* [**78*] *Warlters*, very clearly explains the reasons upon which this doctrine is founded.

“The clause in question in the Statute of Frauds,” says his Lordship, “has the word *agreement* (*‘unless the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing,’ &c.*): and the question is, whether that word is to be understood in the loose incorrect sense in which it may sometimes be used as synonymous to promise or undertaking, or in its more proper and correct sense, as signifying a mutual contract, on consideration, between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect: the more so when it is considered by whom that statute is said to have been drawn, by Lord *Hale*, one of the greatest judges who ever sat in Westminster Hall, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged, in the form of the proceeding against him, *upon his special promise*; but without a legal *consideration* to

(*t*) See *post*, p. *79.

(*x*) 4 B. & Ald. (6 E. C. L. R.) 595.

(*u*) 5 East, 10.

(*y*) 3 B. & B. (7 E. C. L. R.) 14.

sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in [*79] writing. The *obligatory part is indeed the promise, which will account for the word promise being used in the first part of the clause; but still, in order to charge the party making it, the statute proceeds to require that the *agreement* (by which must be understood the *agreement* in respect of which the promise was made) must be reduced into writing. And indeed it seems necessary for effectuating the object of the statute, that the consideration should be set down in writing as well as the promise; for, otherwise, the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one; and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the Act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration as well as the promise would be rendered certain.”¹ The point, however, actually de-

¹ The decisions upon this point have been various and often in the same State have been conflicting. The English cases are stated in the text. Outside of Great Britain it would appear that it has been considered necessary, apart from precise statutory directions for the consideration to appear in the memorandum in CANADA, *Gerow v. Clark*, 9 U. C. Q. B. 223, and in ALABAMA, *Rigby v. Norwood*, 34 Ala. 132; DELAWARE, *Weldin v. Porter*, 4 Houst. 239; ILLINOIS, *Prather v. Vineyard*, 9 Ill. 48; *Patmor v. Haggard*, 78 Ill. 609; MARYLAND, *Ordeman v. Lawson*, 49 Md. 155; *Culbertson v. Smith*, 52 Ib. 634; and WISCONSIN, *Taylor v. Pratt*, 3 Wis. 692. The weight of authority in America, however, is the other way, and it has been held that unless expressly required by statute the memorandum need not express the consideration in the UNITED

cided in *Wain v. Warlters*, is no longer law as to the particular description of contracts to which that case

STATES Courts, *D'Wolf v. Rabaud*, 1 Peters, 501; *Fowler v. MacDonald*, 4 Cr. C. C. 297; *How v. Kemball*, 2 McLean, 107; CONNECTICUT, *Sage v. Wilson*, 6 Conn. 81; *Nichols v. Johnson*, 10 Ib. 198; FLORIDA, *Dorman v. Bigelow*, 1 Flor. 290; GEORGIA, *Baker v. Herndon*, 17 Ga. 571; *Davis v. Tift*, 11 Am. L. Rec. 701; LOUISIANA, *Ringgold v. Newkirk*, 3 Ark. 108 (under the civil law); MASSACHUSETTS, *Hunt v. Adams*, 5 Mass. 360; *Packard v. Richardson*, 17 Ib. 127; MISSISSIPPI, *Wren v. Pearce*, 4 Sm. & M. 91; MISSOURI, *Ivory v. Murphy*, 36 Mo. 539; NEW HAMPSHIRE, *Britton v. Angier*, 48 N. H. 422; *Lang v. Henry*, 54 Ib. 59; NORTH CAROLINA, *Ashford v. Robinson*, 8 Ired. 114; *Miller v. Irvine*, 1 Dev. & Bat. 103; OHIO, *Reed v. Evans*, 17 Ohio, 128; *Duckwall v. Rogers*, 15 Ohio St. 546; PENNSYLVANIA, *Paul v. Stackhouse*, 38 Pa. St. 306; *Bowser v. Cravener*, 56 Ib. 132; *Giltinan v. Strong*, 64 Ib. 245; SOUTH CAROLINA, *Lecat v. Tavel*, 3 McCord, 158; *Fyler v. Givens*, 3 Hill, 52; *Griffin v. Rembert*, 2 Rich., N. S., 114; TENNESSEE, *Campbell v. Findlay*, 3 Humph. 332; *State v. Humphreys*, 10 Ib. 444; *Whitby v. Whitby*, 4 Sneed, 479; TEXAS, *Ellett v. Britton*, 10 Tex. 210; *Fulton v. Robinson*, 55 Ib. 404; VERMONT, *Ide v. Stanton*, 15 Vt. 689; *Sheehy v. Adarene*, 41 Ib. 541; WEST VIRGINIA, *Capehart v. Hale*, 6 W. Va. 550. In NEW YORK the question has been unusually fruitful of discussion and litigation. From 1830 until 1863 a statutory provision required expressly a statement of the consideration in the memorandum. During this period it had been held in numerous cases that the statement of a consideration was essential, and that the statute required an *explicit* declaration of it; since the repeal of this act there has been some conflict, but the weight of authority appears to be that the effect of the repeal was simply to do away with this added statutory regulation, so that while an expression of consideration was still essential, any words from which it could be gathered or inferred were enough. See *Sears v. Brink*, 3 Johns. 215; *Kerr v. Shaw*, 13 Ib. 236; *Thompson v. Blanchard*, 3 Comst. 335; *Wright v. Weeks*, 25 N. Y. 155; *Burrell v. Root*, 40 Ib. 496; *Marsh v. Chamberlain*, 2 Lans. 293; *May v. Bank of Malone*, 9 Hun, 111; *Speyers v. Lambert*, 1 Sweeny, 338; *Castle v. Beardsley*, 10 Hun, 343.

All the statutes adopted in the United States have not been in precisely the same language. In some the memorandum has been required to contain the "promise," in others the "agreement," and in others the "promise or agreement," and the decision of the question has often been rested on this ground, the court holding that "agreement" embraced a consideration, while "promise" did not: *Thompson v. Hall*, 16 Ala. 207; *Dorman v. Bigelow*, 1 Flor. 290; *Ratliffe v. Trout*, 6 J. J. Marsh. 606; *Pearce v. Wren*, 4 Sm. & M. 97; *Britton v. Angier*, 48 N. H. 422; *Nelson v. Dubois*, 13 Johns. 175; *Campbell v. Findlay*, 3 Humph. 332; *Ellett v. Britton*, 10 Tex. 203; *Violet v. Patton*, 5 Cranch. 151.

As a general rule it has been held that the consideration (where required to be expressed) need not be explicitly stated, it is sufficient if it can be inferred or made out from the memorandum. See cases *supra* and *Forth v. Stanton*, 1 Saunders, 210; *Bainbridge v. Wade*, 16 Q. B. (71 E. C. L. R.) 98;

relates; for now by stat. 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act, 1856), s. 3, if *the special [*80] promise to answer for the debt, default, or mis carriage of another be in writing duly signed, it is not necessary that the consideration should appear in the writing also (z).

The rule, however, laid down in the above case applies to the other four descriptions of contract. Therefore, where a contract was made in writing between a bookseller and an author, which evidently was to endure for more than a year, and which contained stipulations to be performed by the bookseller, but none to be performed on the part of the author, either express or which could be made out by necessary implication; it was decided that an action could not be supported upon this contract for want of any consideration appearing upon its face (a).

But this consideration need not appear in express terms; it is sufficient, as will hereafter appear, that any person of ordinary capacity must infer from the perusal of the memorandum or note that such and no other was the consideration upon which the undertaking was given (b). It must appear in express terms, or by necessary implication (c).

The same reasoning as that employed by Lord *Ellen-*

(z) See *post*, Guaranties.

(a) *Sweet v. Lee*, 3 M. & G. 452.

(b) Per *Tindal*, C. J., *Hawes v. Armstrong*, 1 Bing. N. C. (27 E. C. L. R.) 765.

(c) Per *Parke*, B., *Jarvis v. Wilkins*, 7 M. & W. 412.

Jarvis v. Wilkins, 7 M. & W. 410; *Peate v. Dickens*, 5 Tyr. 124; *Shadwell v. Shadwell*, 9 C. B. N. S. (99 E. C. L. R.) 173; *Greenham v. Watt*, 25 U. C. Q. B. 369; *Church v. Brown*, 21 N. Y. 316; *Bolling v. Munchus*, 65 Ala. 561; *Otis v. Hazeltine*, 27 Cal. 82; *Tingley v. Cutter*, 7 Conn. 295; *Hargraves v. Cooke*, 15 Ga. 324; *Wilson Sewing Machine Co. v. Schnell*, 20 Minn. 40; *Hutton v. Padgett*, 26 Md. 431; *Ordeman v. Lawson*, 49 Md. 155; *O'Bannon v. Chumasero*, 3 Montana, 422; *Simons v. Steele*, 36 N. H. 73; *Laing v. Lee*, *Spencer*, 339.

borough in *Wain v. Warlters*, clearly shows that all the terms of the agreement, as well *as the consideration, must be expressed in the memorandum. [*81]

Thus an auctioneer's receipt given for the deposit money on a sale is insufficient to prove the agreement of sale if it does not mention the price (*d*). An agreement for a lease not specifying a definite term, does not satisfy the requirement of the statute (*e*). Thus a memorandum in the following words is insufficient as such an agreement:—"August 11, 1866. Received of D. the sum of £10 as part purchase-money of £390, of 4 cottages, situated 23, 24, 28, and 29 W. Street, B., ground rent £3 each, purchase to be completed within one month from this date, the lease and counterpart to be paid for by D., and to be £5, exclusive of stamps.—J. E." It will be observed that this memorandum defines the property, the price, and the parties; but though it is obvious that a lease is intended to be conveyed, yet the *duration* of that lease is not expressed (*f*). So an executory agreement for a lease (*i. e.*, an agreement for a lease to commence at some subsequent time), does not satisfy the statute unless it can be collected from it on what day the term is to begin (*g*). So if the *names of both buyer and seller are not mentioned in the agreement, or at all events if they are not sufficiently ascertained by description therein, it is insufficient. Thus, in *Williams v. Lake* (*h*), a guaranty signed by the defendant was in these words—"April 27, 1857. [*82]

(*d*) *Blagden v. Bradbear*, 12 Ves. 466; *Elmore v. Kingscote*, 5 B. & C. (11 E. C. L. R.) 583; *Goodman v. Griffiths*, 26 L. J. (Ex.) 145; 1 H. & N. 574.

(*e*) *Clinan v. Cooke*, 1 Sch. & Lefr. 22; *Fitzmaurice v. Bagley*, Ex. Ch.; 27 L. J. (Q. B.) 143.

(*f*) *Dolling v. Evans*, 36 L. J. (Ch.) 474.

(*g*) *Marshall v. Berridge*, 19 Ch. Div. 233; 51 L. J. (Ch.) 329. In such a case there is no inference that the term is to commence from the date of the agreement, in the absence of language pointing to that conclusion. *Ib*.

(*h*) 2 E. & E. (105 E. C. L. R.) 349, 29 L. J. (Q. B.) 1.

Sir, I beg to inform you that I shall see you paid to the sum of £800 for the ensuing building which you undertake to build for Messrs. Thomas and Owens, of Cap Coch. Thomas Lake." The defendant had delivered this to one John Thomas, intending it to be given to Thomas Jones, who was in treaty to build houses for Thomas and Owens, but Jones refusing to build them, they agreed with plaintiff to build them, and gave him the guaranty. Of this the defendant was ignorant, but he afterwards assented to the plaintiff having the guaranty. It was held that an action could not be brought upon the guaranty, as the plaintiff's name did not appear in it. "The objection," said *Cockburn*, C. J., "that there was no agreement or memorandum, or note thereof within the Statute of Frauds, must prevail, on the simple ground that in order that any agreement or memorandum should be sufficient, it is absolutely necessary that the names of the parties to the agreement should appear on its face. It is said that the [*83] 'terms *are satisfied if the note of the agreement contains a proposal which is acceded to by words. But I cannot concur in that way of putting it; the only difference between an 'agreement' and the 'note' of an agreement is, that in the one instance a formal agreement is meant, and in the other something not so particular in form and technical accuracy, but still containing the essentials of the agreement. The essentials of the agreement must be stated, that is to say, the subject-matter of it (*i*), the extent of the liability contracted thereby, if any, and the names of both parties to it: and, I think, not only is that the fair construction to be put upon the statute, but when we look

(*i*) As to what amounts to a sufficient description of the property in the case of a sale of real estate, so as to satisfy the statute, see *Shardlow v. Cotterell*, 20 Ch. Div. 90 (C. A.); 51 L. J. (Ch.) 353, (reversing 18 Ch. Div. 280, 50 L. J. (Ch.) 613), and the authorities there cited.

at the mischief intended to be prevented, it is clear that the writing which constitutes a liability on one side, without stating the name of the other party to whom it was given, would lead to the very thing which the statute was intended to prevent, namely, fraud. There might have been an agreement for building another set of houses, or the agreement might have been of the same houses, and this might have been put into the hands of some person to whom the defendant never intended to give a guaranty, and it might be enforced by *parol evidence showing that it was intended to come into the hands of that person, while the [*84] defendant might resist it by parol evidence, so that the very contest would take place which the statute was intended to prevent. The mischief would not be effectually remedied, unless we held that this guaranty was not sufficient."

The statute, however, is satisfied if the vendor and purchaser are sufficiently described, though their names do not appear (*j*). Thus, upon a sale by auction of real estate in lots, the particulars stated that the sale was by direction of the "proprietor," but the name of the vendor did not appear. A memorandum on a copy of the particulars was signed by the purchaser of one of the lots, and by the auctioneer on behalf of the vendor. It was held that the vendor was sufficiently described, and that the memorandum was sufficient to satisfy the requirements of the statute (*k*). On the other hand, where the particulars and conditions did not disclose the vendor's name, and in some places spoke of "vendors" in the plural; although for the most part "vendor" was

(*j*) *Hood v. Lord Barrington*, L. R. 6 Eq. 218; *Sale v. Lambert*, L. R. 18 Eq. 1, 43 L. J. (Ch.) 470; *Potter v. Duffield*, L. R. 18 Eq. 4, 43 L. J. (Ch.) 472. See also *Williams v. Byrnes*, 1 Moo. P. C. N. S. 154; 9 Jur. N. S. 363.

(*k*) *Sale v. Lambert*, *ubi supra*.

used, and a memorandum endorsed on a copy of the particulars and conditions was signed by the [*85] auctioneer on behalf of the "vendor," the description was held insufficient (*l*). In *Rossiter v. Miller* (*m*) "proprietors," in *Catling v. King* (*n*) "trustee selling under a trust for sale," was held a sufficient description.

There is another observation applicable to all the five cases provided for by this section of the statute, namely, that the *agreement*, the meaning of which word I have just explained, need not be contained in a single writing, but may be collected from several. You will find that established by many cases.

The purchaser of flour wrote to the vendor as follows — "I hereby give you notice that the corn you delivered to me in part performance of my contract with you for one hundred sacks of good English seconds flour at 45s. a sack, is of so bad a quality that I cannot sell it or make it into saleable bread. The sacks of flour are at my shop, and you will send for them, otherwise I shall commence an action." To this the vendors answered by their attorney: "Messrs. L. consider that they have performed their contract with you as far as it has gone, and are ready to complete the remainder; and [*86] *unless the flour is paid for at the expiration of one month, proceedings will be taken for the amount." The two writings were considered to constitute a sufficient memorandum of the contract. This case was indeed decided upon the 17th section of the Statute of Frauds, but the reason of the decision applies equally to

(*l*) *Potter v. Duffield*, *ubi supra*. See also *Williams v. Jordan*, 6 Ch. Div. 517; 46 L. J. (Ch.) 681.

(*m*) 5 Ch. Div. 648, 46 L. J. Ch. 228, 737; 3 App. Cas. 1124; 48 L. J. (Ch.) 10 (H. L.). The H. of L. affirmed as to this point, both the M. R. and C. A., but reversed the latter as to the question of there being a concluded agreement.

(*n*) 5 Ch. Div. 660; 46 L. J. (Ch.) 384.

the 4th section (o). In another instance, on a sale by auction, the particulars of sale described the premises, and the conditions of sale were on the same sheet. The plaintiff purchased the property, and on paying the deposit, signed an agreement endorsed on the before-mentioned particulars and conditions, in the words following:—"I do hereby acknowledge myself the purchaser of the property described in the within particulars at and for the price or sum of £94 10s., and I do hereby undertake and agree to perform my part of the conditions therein specified, in furtherance of which I have this day paid the sum of £18 18s., being the amount of the deposit, as also the sum of £2 7s., being my moiety of the government duty. As witness my hand this 11th day of June, 1857, Isaac Dobell" (the plaintiff). Neither the defendant nor any one for him signed the agreement, nor was his name mentioned in it or in the particulars or conditions, except that in the particulars of sale he was referred to for particulars of the premises. On discovering *afterwards that a small yard mentioned in the particulars was not comprised in the lease purchased, which defect was not known at the time of sale to either party, the plaintiff's attorney wrote to the defendant as follows:—"We are instructed to inform you that Mr. Dobell, in consequence of your not having shown a good title to the premises offered for sale on the 11th instant as described in the particulars, declines taking the property, and we have to request that you will direct the auctioneer to return the deposit and duty received by him of Mr. Dobell, and that you will remit to us the expenses incurred in this matter, and make some arrangement for payment thereof." On this the defendant sent a letter

(o) *Jackson v. Lowe*, 1 Bing. (8 E. C. L. R.) 9. See *Barker v. Allan*, 29 L. J. (Ex.) 100.

signed by him to the plaintiff's attorney, in which he mentioned having "stated the case to counsel relating to our sale to Mr. Dobell," and added, "having obtained his opinion thereon, I beg to acquaint you that the reasonable compensation to which he is entitled (alluding to a provision in the condition for compensation) on our securing to him a lease of the yard adjoining the Aberdeen Arms, is £11 16s. If he is willing to accede to this, the business may be completed without delay; if not, we beg to be understood as now calling on Mr. Dobell to settle the compensation in the way provided for. If he declines this, we presume you will accept Chancery process for him at our suit." In another letter to the plaintiff's attorney, the defendant expressly [*88] mentioned the abatement in the price as being according to the condition of sale. It will be observed in this case that the letters of the defendant refer expressly and distinctly to the conditions of sale, and he had in his hands, or those of his auctioneer, at the very time, the conditions of sale signed by the plaintiff to which reference is made, *so that no parol evidence of any kind was requisite to show a contract binding both parties*, except evidence of the handwriting of each, which must be adduced in all cases. For these reasons the Court of King's Bench was of opinion that there was a sufficient contract within the Statute of Frauds (*p*). Neither is it material that the letters out of which the contract may be proved, are written to third parties (*q*), even to the writer's own agent, provided the contract be fully recognized therein (*r*). A

(*p*) Dobell v. Hutchinson, 3 A. & E. (30 E. C. L. R.) 355; Ridgway v. Wharton, 27 L. J. (Ch.) 46; 6 H. of L. C. 238; Baumann v. James, L. R. 3 Ch. 508; Long v. Millar, 4 C. P. D. 450; 48 L. J. (Q. B., etc.) 596; Cave v. Hastings, 7 Q. B. D. 125; 50 L. J. (Q. B.) 575.

(*q*) Welford v. Beazley, 3 Atk. 503; Owen v. Thomas, 3 Myl. & K. 353.

(*r*) Gibson v. Holland, L. R. 1 C. P. 1; 35 L. J. (C. P.) 5.

remarkable instance of the application of this rule is afforded by the case of *Hammersley v. Baron de Biel* (s). It will be recollected that one of the cases in which a written contract or memorandum is required by the Statute of Frauds, is where any promise is made in consideration of marriage. In *the present instance, [*89] proposals of marriage had been written by the lady's brothers by her father's authority, which were described therein to be the bases of the arrangement, subject, of course, to revision; and as sufficient for the proposed husband to act upon. These proposals were not signed. A letter, afterwards written and signed by the father after the marriage, admitting the terms of the written proposals, was considered as a recognition of them as his agreement, and sufficient within the Statute of Frauds.

But though, where there are several papers, the agreement may be collected from them all, provided they are sufficiently connected in sense among themselves, so that a person looking at them all together can make out the connection and the meaning of the whole without the aid of any verbal evidence; yet it is otherwise when such connection does not appear on the face of the writings themselves; for, to let in parol evidence in order to connect them with one another, would be to let in the very mischief which it was the object of the framers of the Act to avoid, namely, the uncertainty and temptation to falsehood occasioned by allowing the proof of the contract to depend on the recollection of witnesses: and, therefore, where a written agreement is required by the 4th section of the statute, it is clear that several writings, not bearing an obvious connection *inter se* in sense, cannot be joined together by verbal evidence to make up the *agreement. This was one of [*90] the points decided in the great case of *Boydell*

v. Drummond (t), where the plaintiff proposed to publish an edition of Shakespeare with splendid engravings, and issued a prospectus stating the terms. A copy of the prospectus lay in his shop, and beside it lay a book headed "*Shakespeare Subscribers, their Signatures:*" but there was nothing in the book about the prospectus, or in the prospectus about the book. The defendant had signed the book, and, having afterwards refused to continue taking in the Shakespeare, the plaintiff brought an action against him. Now, the Shakespeare was not to be finished for some years, and therefore the case was one of those provided for by the 4th section of the Statute of Frauds, falling within the words "any agreement that is not to be performed within one year from the making thereof." It was, therefore, necessary that it should be in writing, and that that writing should be "*signed* by the party to be charged, or his agent." Now, the terms of the agreement were in the *prospectus*, and so far the statute had been complied with; but the *signature* unluckily was in the book: and the Court held, that, as the prospectus did not refer to the book, or the book to it, the statute had not been complied with, and the contract could not be enforced. "If," said *Le Blanc, J.*, "there had been anything in that book *which had referred to the particular pro-
[*91] spectus, that would have been sufficient; if the title to the book had been the same with that of the prospectus, it might perhaps have done: but, as the signature now stands, without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time to which the signature related: the case therefore falls directly within this branch of the Statute of Frauds."

(t) 11 East, 142.

So too, where property is sold by auction subject to conditions of sale, an entry made at the time of the sale in the auctioneer's book which contains either no reference at all to the conditions, or no reference such as to identify the conditions upon their production as being the conditions contained in the entry, is insufficient to satisfy the statute, though the entry contain the names of the vendor and purchaser, the subject-matter of the contract and the price to be paid (*u*).

Still, where the contract is sought to be made out from more than one document, although parol evidence is inadmissible to connect the documents, and so partly by parol evidence, partly by writing to make out a contract, yet parol evidence is admissible to identify one document referred to in another as the document actually intended by that *reference. This, indeed, [*92] is merely a particular application of the doctrine as to latent ambiguity (*x*) already referred to (*y*). To use the illustration given by *Bramwell*, L. J., in the case just cited (*z*), "Suppose that A. writes to B., saying that he will give £1000 for B.'s estate, and at the same time states the terms in detail, and suppose that B. simply writes back in return 'I accept your offer.' In that case there may be an identification of the documents by parol evidence, and it may be shown that the offer alluded to by B. is that made by A., without infringing the Statute of Frauds, sect. 4, which requires a note or memorandum in writing." This illustration has been applied in *Cave v. Hastings* (*a*). There the plaintiff

(*u*) *Rishton v. Whatmore*, 8 Ch. Div. 467; *Peirce v. Corf*, L. R. 9 Q. B. 210; 43 L. J. Q. B. 52.

(*x*) See per Thesiger, L. J. in *Long v. Millar*, 4 C. P. D. 450, 456; 48 L. J. (Q. B. etc.) 596, 600.

(*y*) *Ante*, p. *49.

(*z*) 4 C. P. D. 454; 48 L. J. (Q. B. etc.) 599.

(*a*) 7 Q. B. D. 125; 50 L. J. (Q. B.) 575.

had signed, on the 1st of December, 1879, a memorandum agreeing to provide a Victoria, horse, harness, and a coachman, to the defendant's satisfaction, for one year, from the 1st of January, 1880, for £18 10s. per month, and occasionally, in wet weather, the use of a Brougham; but this document was not signed by the defendant. The latter, in a subsequent letter, signed by him, to the plaintiff, referred to "our arrangement for the hire of your carriage." It was held that parol evidence was [*93] admissible to shew *that there could be no other arrangement than that contained in the memorandum to which the defendant could have intended to refer, and the first document being thus identified with the reference in the defendant's letter, it was held that there was a sufficient memorandum in writing to satisfy the 4th section of the Statute of Frauds.

There is a third point common to all the five contracts mentioned in the 4th section; it is with regard to the signature. The words are, you will recollect, "*signed by the party to be charged* therewith, or some other person thereunto by him lawfully authorized." The signature, it is obvious, is most regularly and properly placed at the foot or end of the instrument signed: but it is decided in many cases, that although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot; although, if not signed regularly at the foot, there is always a question whether the party meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract, and signed by him. Therefore, where in the case of the sale of a quantity of cotton yarn, a bill of parcels was sent by the seller to the purchaser, headed:—"Lon-

don, 24th Oct., 1812.—Messrs. John Schneider & Co., bought of Thomas Norris * & Co., agents, cotton [*94] yarn and piece goods. No. 3, Freeman's Court, Cornhill."—Following this was a list of the articles sold, the particulars, quantities, and prices. It was held, in an action for not delivering the yarn, to contain a sufficient memorandum to satisfy the requirement of the statute as to the signature of the party to be charged (*b*). In this case, the whole of the heading of the bill of parcels was printed, except the words "Messrs. John Schneider & Co." But as it was then given out to the other contracting party by the party to be charged, recognizing the printed name as much as if he had subscribed his mark to it, he had recognized and avowed it as his signature (*c*). For the same reason, where the plaintiff's traveller called on the defendant with samples of hops, and agreed with him for sale of them, and the defendant thereupon wrote in a book of his own, of which he retained possession, as follows:—"Leeds, 19th Oct., 1836.—Sold John Dodgson, 27 pockets Playstead, 1836, Sussex, at 103s., the bulk to answer the sample; 4 pockets Selmes Berkleys at 95s., samples and invoice to be sent per Rockingham coach,—payment in banker's in two months," which was signed, at the defendant's request, by the plaintiff's traveller thus:—"Signed, for Johnson & *Co., D. Morse," this [*95] was deemed a sufficient signature of the contract to bind the defendant; for the defendant's name was contained in it in his own handwriting, and his having required plaintiff's agent to sign it showed that he meant it to be a memorandum of contract between the parties (*d*). But, of course, where it appears that, notwith-

(*b*) *Schneider v. Norris*, 2 M. & S. 286.

(*c*) See *Saunderson v. Jackson*, 2 Bos. & P. 238.

(*d*) *Johnson v. Dodgson*, 2 M. & W. 653. See *Lobb v. Stanley*, 5 Q. B. (48 E. C. L. R.) 574; *Lewis v. Lord Kensington*, 2 C. B. (52 E. C. L. R.) 463.

standing the insertion of the parties' names in the instrument, it was intended that their signatures should be affixed in the proper place, such an instrument would not be a compliance with the statute, as it could not be considered as signed by them. Therefore, where articles of agreement contained the terms of a contract which was not to be performed within a year, purporting to be made between certain persons whose names were stated at the commencement of the articles, and who were described as the contracting parties, and concluded with the words, "As witness our hands," without being followed by any name or signature, they were held not to be sufficiently signed within the Statute of Frauds (*e*). And as a signature in print is good (*f*), so is a signature in pencil. This, indeed, was held in a [*96] case of a pencil endorsement *of a promissory note, but it seems equally applicable to the signature required by the Statute of Frauds (*g*). There is also little or no doubt that a party may sign, within this statute, by stamping his signature instead of writing it (*h*). It seems, too, that a telegram containing, as usual, the names of the sender and receiver, would be a sufficient writing signed, within the statute, to bind the sender (*i*)¹ The signature is to be that of the party *to be charged*; and, therefore, though, as I have pointed

(*e*) *Hubert v. Treherne*, 3 M. & G. (42 E. C. L. R.) 743. See also *Caton v. Caton*, L. R. 2 H. L. 127; 36 L. J. (Ch.) 886.

(*f*) *Schneider v. Norris*, *supra*.

(*g*) *Geary v. Physic*, 5 B. & C. (11 E. C. L. R.) 234.

(*h*) *Bennett v. Brumfitt*, L. R. 3 C. P. 28; 37 L. J. (C. P.) 25.

(*i*) *Godwin v. Francis*, 39 L. J. (C. P.) 121; L. R. 5 C. P. 295. See also *Williams v. Prisco*, 22 Ch. Div. 441.

¹ Among the American cases are *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B. 66; *Durkee v. Vermont Central R. Co.*, 29 Vt. 140; *Dunning v. Roberts*, 35 Barb. 468; *Beach v. R. R.*, 37 N. Y. 457. See 4 Am. L. Reg. N. S. 207. In *Indiana* (Rev. Stat. 1881, § 4180) there is a statutory provision that contracts by telegraph shall be considered contracts in writing.

out to you, both sides of the agreement must appear in the writing, the consideration as well as the promise, it is not necessary that it should be signed by both the parties; it is sufficient if the party suing on it is able to produce a writing signed by the party whom he is seeking to *charge* (*k*).¹ And such a writing signed is sufficient to satisfy the 4th section, though it be only a proposal accepted by parol by the party to whom it is made (*l*). The person, however, who seeks to enforce the agreement has not the other altogether at his mercy, but must either do, or be ready to *do, his own part of the agreement, before he can seek per- [*97]formance on the part of the person who has signed (*m*).

But although the written memorandum may be made and signed subsequently to the making of the contract (*n*), yet it must exist before an action is brought upon it (*o*).

(*k*) *Laythorp v. Bryant*, 2 Bing. N. C. (29 E. C. L. R.) 735.

(*l*) *Reuss v. Picksley*, L. R. 1 Ex. 342; 35 L. J. (Ex.) 218, Ex. Ch., confirming *Warner v. Willington*, 3 Drew. 523, 25 L. J. Ch. 662; *Smith v. Neale*, 2 C. B. (N. S.) (89 E. C. L. R.) 67; 26 L. J. (C. P.) 143.

(*m*) *Reuss v. Picksley*, L. R. 1 Ex. 342, 353; 35 L. J. (Ex.) 218, Ex. Ch.

(*n*) *Leroux v. Brown*, 22 L. J. (C. P.) 1; 12 C. B. (74 E. C. L. R.) 801; *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 313, 46 L. J. (Q. B., etc.) 212. In the latter case, where the minute book of a company contained a resolution admitting a contract, the signature of the chairman, affixed at the next meeting to attest the accuracy of the minute, was held a sufficient signature of the company's agent to satisfy the 4th sect.

(*o*) *Bill v. Bament*, 9 M. & W. 36, *quære*—see *Fricker v. Tomlinson*, 1 M. & G. (39 E. C. L. R.) 772.

¹ As it was in *Penniman v. Hartshorn*, 13 Mass. 87; *Hawkins v. Chace*, 19 Pick. 502; *Ballard v. Walker*, 3 Johns. Cas. 60; *Clason v. Bailey*, 14 Johns. 487; *Douglass v. Spears*, 2 N. & McC. 207; *Anderson v. Harold*, 10 Ohio, 399; *Smith v. Smith*, 8 Blackf. 208. By the New York Revised Statutes the memorandum must be *subscribed*; and it is held, therefore, that a signature elsewhere than at the bottom or end of the writing is insufficient to satisfy the statute as thus varied: *Davis v. Shields*, 26 Wend. 341. [See *Mutual Ins. Co. v. Ross*, 10 Abb. Pr. 260; *Hubbell v. Livingtone*, 1 Code Rep. (N. Y.) 63.]—R.

Signature by initials is valid and parol evidence is admissible to apply them: *Sanborn v. Flagler*, 9 Allen, 474. A telegram accepting an offer and completing a contract is sufficient to take a case out of the statute: *Trevor v. Wood*, 36 N. Y. 307. [See *Reed*, Statute of Frauds, Chap. xvi.]—s.

The last point I shall mention common to all the contracts falling within *this* section regards the consequence of non-compliance with its provisions. This consequence is, not that the unwritten contract shall be void, but *that no action shall be* brought to charge the contracting party by reason of it (*p*). And cases may occur in which the contract may be made available without bringing an action on it; and in which, consequently, it may, *though unwritten, be of some [*98] avail. Thus, for instance, if money have been paid in pursuance of it, that payment is a good one for all purposes: thus, where £100 was paid by the incoming tenant to the outgoing one, partly for himself, and partly for the landlady, in pursuance of a verbal agreement, and the outgoing tenant refused to pay the landlady her share, saying that there was no writing, and that words were but wind; on the landlady bringing her action, Lord *Ellenborough* nonsuited her, on the ground that the agreement, being for an interest in land, ought to have been in writing; but the Court of King's Bench set aside the nonsuit, with Lord *Ellenborough's* own concurrence (*q*).¹ And where, to an action for goods sold, the defendant pleaded an agreement that, in consideration of the defendant giving up possession of certain premises and stock-in-trade, the plaintiff should pay him £100, and also discharge him from all debts and causes of action, which premises had been given up and the £100 paid; it was decided that

(*p*) Per *Bosanquet*, J., in *Laythorp v. Bryant*, *supra*. See *Britain v. Rositer*, 48 L. J. (Q. B.) 362; 11 Q. B. D. 123; *Maddison v. Alderson*, per Lord *Blackburn*, 8 App. Cas. 488; 52 L. J. (Q. B.) 749; *In re Hilliard*, 2 D. & L. 919; *Sweet v. Lee*, 3 M. & G. (42 E. C. L. R.) 452; *Crosby v. Wadsworth*, 6 East, 611; *Carrington v. Roots*, 2 M. & W. 248.

(*q*) *Griffith v. Young*, 12 East, 213. See *Cocking v. Ward*, 1 C. B. (50 E. C. L. R.) 858; *Pulbrook v. Lawes*, 1 Q. B. D. 284; 45 L. J. (Q. B.) 178.

¹ To the same effect is *Philbrook v. Belknap*, 6 Vt. 383.—B.

this accord and satisfaction might be proved by parol; although, if it had been required to enforce the delivery up of possession of the premises, a writing might have been necessary (*r*).

Although these lectures only profess to deal with *contracts under their Common Law aspect, and to treat of such subjects as have been, previously [*99] to the Judicature Acts of 1873 and 1875, enforceable by action in the Courts of Common Law, it should be briefly noticed here that the Courts of Equity would enforce the complete performance of an agreement which came within the 4th section of the Statute of Frauds, even where the absence of a writing sufficient to satisfy the statute would have been an insuperable obstacle to success at Law, provided that the party who sought to enforce the agreement had himself partly performed his share of it. In other words, in Equity part performance took the case out of the statute. This doctrine, indeed, had always been confined in Equity to questions relating to land (*s*), but when the provisions of the Judicature Act of 1873 (*t*) came into force, which enable the High Court and Court of Appeal to recognize all equitable duties and liabilities appearing in the course of any matter before them, and to grant all remedies in respect of any legal or equitable claim; and which provide, too, that where "there is any conflict between the rules of Equity and the rules of Common Law with reference to the same matter, the rules of Equity shall prevail;" it was thought possible that the equitable doctrine of part performance might [*100] *become applicable to contracts other than those to which Courts of Equity had been in the habit of

(*r*) *Lavery v. Turley*, 30 L. J. (Ex.) 49.

(*s*) *Britain v. Rossiter*, 48 L. J. (Q. B.) 364, 366; 11 Q. B. D. 129, 130.

(*t*) 36 & 37 Vict. c. 66, s. 24, sub-ss. 4, 7, and s. 25, sub-s. 11.

applying it. Accordingly, in *Britain v. Rossiter (u)*, it was sought to apply it to a contract of service. There the plaintiff and defendant had entered into an agreement in writing, but not signed, for the plaintiff to serve for a year as clerk and accountant to the defendant. The agreement was concluded on Saturday, the 21st of April, 1877; the plaintiff's service began on the Monday following. It was, therefore, a contract not to be performed within a year, and a writing, duly signed, became necessary in the event of an action being brought on the contract. The plaintiff served some months, and was then dismissed at a month's notice, and subsequently brought his action. The Court of Appeal, before whom it was contended that the plaintiff was entitled to recover, on the ground of part performance taking the case out of the statute, refused to extend the application of the doctrine to any cases in which Equity had not applied it, holding that to apply it to a contract of service which could not have come within the jurisdiction of the Court of Chancery would be to construe the Judicature Acts as conferring new rights, whereas in truth they only change the procedure; and the Court held that the plaintiff could not

[*101] maintain the action. By this decision, *therefore, the law seems now to be settled that the doctrine of part performance only applies to cases relating to land. It is not intended here to go further into the subject of part performance, or to consider what acts of part performance have been held sufficient to take the case out of the statute. The student who desires further information on the subject is recommended to peruse carefully the judgment in the case of *Maddison v. Alderson (x)*, recently decided in the

(u) 48 L. J. (Q. B.) 362; 11 Q. B. D. 123.

(x) 8 App. Cas. 467; 52 L. J. (Q. B.) 737 (H. L.), affirming *Alderson v.*
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House of Lords; and is also referred to the case of *Lester v. Foxcroft*, and the notes thereto in White and Tudor's "Leading Cases in Equity (y)."

I have now pointed out to you the matters in which all simple contracts agree, and the practical differences which exist between the effect of *written* and that of *verbal contracts*, although in theory both sorts fall within the denomination *Simple Contracts*. I have described the consequences which follow from the rules of evidence upon the reduction of any contract whatever into writing, and I have begun to describe those consequences which follow from the provisions of the Statute of Frauds, in the cases to which it is applicable. But as it is impossible to finish the consideration of that statute this evening, I shall proceed with it in the next Lecture.

Maddison, 7 Q. B. D. 174 (C. A.), 50 L. J. (Q. B.) 466; and reversing S. C. 5 Ex. Div. 293; 49 L. J. (Q. B.) 801.

(y) White & Tu. vol. i. p. 828, 5th ed.

THE FOURTH SECTION OF THE STATUTE OF FRAUDS.—
 PROMISES BY EXECUTORS AND ADMINISTRATORS.—
 GUARANTIES.—MARRIAGE CONTRACTS.—CONTRACTS
 FOR THE SALE OF LAND.—AGREEMENTS NOT TO BE
 PERFORMED IN A YEAR.

I HAVE now touched on the points which [with one exception made by the provisions of a recent statute in the case of guaranties] equally apply to each of those five species of contracts to which the 4th section of the Statute of Frauds relates; those, namely, which regard the appearance in the writing of the consideration and other terms as well as the promise, the *signature* which the statute requires, and the consequences of not reducing into writing contracts which the statute requires should be so evidenced. It remains, before terminating the consideration of that section of the Act, to consider each of the five particular species of contracts to which it applies.

The *first* is—*any special promise by an executor or administrator to answer damages out of his own estate.*

The principal case on this subject is *Rann v. Hughes* (a), which went up to the House of
 [*103] Lords. The point decided in that case is, that the Statute of Frauds in no manner affected the validity of such promises, or rendered them enforceable in any case in which at Common Law they would not have been so; but merely required that they should be

(a) 7 T. R. 350, n.; 7 Bro. Parl. C. 550. *Forth v. Stanton*, 1 Wms. Saund. p. 211, n. 2.

reduced into writing leaving the written contract to be construed in such a manner as a parol contract would have been, had there been no writing. The opinion of the judges was delivered to the House of Lords by L. C. Baron *Skynner*, and is extremely instructive. Being very short, it is here inserted:—"It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means nor affords any remedy to compel the performance of any agreement made without sufficient consideration. Such agreement is *nudum pactum ex quo non oritur actio*; and whatever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant, being indebted as administratrix, promised to pay when requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but *the promise must be co-extensive with the considera- [*104] tion, unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right, in consideration of forbearance for a particular time, promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right; but here no sufficient consideration occurs to support this demand against her in her personal capacity, for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing, that

takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing: and that after verdict, if it were necessary to support the promise that it should be put in writing, it will after verdict be presumed that it was in writing: and this last is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol; nor is there any [*105] such *third class, as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the Statute of Frauds has taken away the necessity of any consideration in this case; the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable." His Lordship here read those sections of that statute which relate to the present subject. He observed, "that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing the party must be at all events liable." He said that "all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being

now supposed to have been in writing makes no difference."¹

The next species of promise mentioned in the 4th section is, *any special promise to answer for the debt, default, or miscarriage of another person.*

*This includes all those promises which we ordinarily denominate *guaranties*, and has given [*106] rise to a very great deal of discussion.

In the first place, it has been decided, that the sort of promise which the statute means, and which must be reduced into writing, is a promise to answer for the *debt, default, or miscarriage of another person, for which that other person himself continues liable.* Thus, if A. go to a shop, and say, "Let B. have what goods he pleases to order, and if he do not pay you *I* will," that is a promise to answer for a debt of B. for which B. is himself also liable: and if it be sought to enforce it, it must be shown to have been reduced into writing: but if A. had said, "Let B. have goods on my account," or, "Let B. have goods and charge me with them:" in these cases no writing would be required, because B. never would be liable at all, the goods being supplied on A.'s credit and responsibility, though handed by his directions to B. (b).²

(b) *Birkmyr v. Darnell*, Salk. 27; and the notes to *Forth v. Stanton*, 1 Wms. Saund, 211 b, 211 c.

¹ *Sidle v. Anderson*, 45 Pa. St. 464.—s.

² The party for whom the promise is made must be liable to the party to whom it is made: *Boykin v. Dohlonde*, 37 Ala. 577; *Downey v. Hinchman*, 25 Ind. 453. A request to one to work for the benefit of a third party and a promise to pay, form an original, not a collateral promise: *Brown v. George*, 17 N. H. 128; *Dorwin v. Smith*, 35 Vt. 69; *Smith v. Rogers*, Ib. 140; *Williams v. Little*, Ib. 323. A's promise to pay a debt due from C. need not be in writing if it is made in consideration of C.'s release therefrom: *Day v. Cloe*, 4 Bush, 563; *Packer v. Benton*, 35 Conn. 343; *Yale v. Edgerton*, 14 Minn. 194; *Harris v. Young*, 4 Ga. 65; *Uhler v. Farmers' Bank*, 64 Pa. St. 406. The statute does not apply where the promise is to pay his own debt, though it may be incidentally a guarantee of the obligation of another: *Malone v.*

Upon these grounds where there were three executors and trustees, and A. Orrell, one of them, renounced to enable himself to purchase some of the testator's property, which, while trustee, he could not do without leave of the Court, and afterwards purchased the property, and losses were incurred by the trustees, and a claim for them was raised in Equity by the legatees, where-
 [*107] upon *Orrell, by his solicitor, wrote to them agreeing to pay £3000 in satisfaction of these losses; the Court of Chancery held that this letter was not within the Statute of Frauds as a promise merely to satisfy the debt of another, but was an undertaking to pay the debt which it was insisted, rightly or wrongly, that Orrell was liable for (*c*).

For this reason, where the plaintiff had issued execution against Lloyd for debt, and Lloyd, with the plaintiff's consent, conveyed all his property to defendant, who thereupon undertook to pay the plaintiff the debt due from Lloyd upon the plaintiff's withdrawing the execution, and giving up his claim on Lloyd; the defendant's undertaking was held not to be a promise to answer for another's debt for which that other remained liable (*d*).

But where Buxton had sued the defendant in Chancery, and had retained plaintiff in that suit as his solicitor, and costs had been incurred to the plaintiff, and it was agreed by the three that the suit should be discontinued, and that the defendant should pay the plaintiff these costs, it was held that since Buxton's debt to the plaintiff remained, he being still liable to pay plaintiff's costs, the defendant's promise was to pay the

(*c*) Orrell *v.* Coppock, 26 L. J. (Ch.) 269; Adams *v.* Dansey, 6 Bing. (19 E. C. L. R.) 506; Batson *v.* King, 28 L. J. (Ex.) 327.

(*d*) Bird *v.* Gammon, 3 Bing. N. C. (32 E. C. L. R.) 883.

Keener, 44 Pa. St. 107; Stoudt *v.* Hine, 45 Ib. 30; Besshears *v.* Rowe, 46 Mo. 501; Chamberlin *v.* Ingalls, 38 Iowa, 300; Blair Land Co. *v.* Walker, 39 Ib. 406; Lester *v.* Bowman, Ib. 611.—s.

debt of another, *and could not be sued upon, not being in writing (*e*). In another instance, [*108] the plaintiff became bail for one Hadley, at the defendant's request, and upon his promise to indemnify the plaintiff from all damages and expenses which he should sustain by reason of his so becoming bail; and the Court clearly held this was a promise to answer for the default of another, and was not the less so because it was in the form of a promise to indemnify (*f*). In another case the plaintiff contracted to supply A. with iron plates, and delivered a part of them, but refused to deliver the rest unless he was paid in cash. The defendant, who had an interest in the contract, thereupon agreed that if the plaintiff would deliver the remainder he would cash A.'s acceptances for the goods already and thereafter to be delivered, and protect the plaintiff from the bills when due. The defendant was to receive 3 per cent. on the amount of the bills. It was held that a contract to give a guaranty is required to be in writing as much as a guaranty itself: that here there was substantially a contract that if A., the buyer of the goods, did not pay for them when the acceptance became due, the defendant would indemnify the plaintiff against the buyer's default, which was an engagement to answer for the debt *or default of another, and not being in writing could not be enforced (*g*). [*109]

Goodman *v.* Chase (*h*) presents rather a singular instance of the application of the rule of construction of which I have been speaking. In that case, a debtor had been taken in execution, and Chase, in consideration

(*e*) Tomlinson *v.* Gell, 6 A. & E. (33 E. C. L. R.) 564.

(*f*) Green *v.* Cresswell, 10 A. & E. (37 E. C. L. R.) 453. See Cripps *v.* Hartnoll, 32 L. J. (Q. B.) 381, Ex. Ch.

(*g*) Mallett *v.* Bateman, 16 C. B. (N. S.) (111 E. C. L. R.) 530; 33 L. J. (C. P.) 243; S. C. in Ex. Ch., L. R. 1 C. P. 163; 35 L. J. (C. P.) 40.

(*h*) 1 B. & Ald. 297; Butcher *v.* Steuart, 11 M. & W. 857.

that the creditor would discharge him out of custody, promised to pay his debt; when the debtor was accordingly discharged. It was held, that this promise need not be in writing; for that, by discharging the debtor out of execution, the debt was gone; it having been, as you are probably aware, before the coming into operation of stat. 32 & 33 Vict. c. 62 (The Debtor's Act, 1869), ss. 4, 5, a rule of law that if a debtor were once taken in execution and discharged by his creditor's consent, that operated as a satisfaction of the debt;¹ and therefore that, the debtor having ceased to be liable, the promise to pay the amount was not a promise to pay any sum for which another person was responsible, and therefore did not require to be reduced into writing. If what was originally the debt of another has been made by the defendant his own debt, it cannot afterwards, as between the creditor and himself, be considered the debt of another (*i*).

[*110] *But take the case where one makes a promise to be answerable for the debt of another, and that other never becomes legally indebted to the promisee. Is that within this branch of the 4th sect.

(*i*) *Fitzgerald v. Dressler*, 29 L. J. (C. P.) 113; 7 C. B. (N. S.) (97 E. C. L. R.) 374.

¹ *Sharpe v. Speckenagle*, 3 S. & R. 463; *Palethorpe v. Leshner*, 2 Rawle, 274; *Snevily v. Read*, 9 Watts, 396; *Lathrop v. Briggs*, 8 Cow. 171; *Ransom v. Keyes*, 9 Ib. 128; and this, although he may have been discharged on terms not afterwards complied with: 1 T. R. 558; 6 Ib. 525; 7 Ib. 420.—R.

A judgment creditor, who had taken the body of his debtor in execution, agreed that he might be set at liberty on giving security to abide the event of the trial of an issue to be framed for ascertaining whether he had the means, by the property in his marriage settlement or otherwise, of satisfying the judgment; the debtor acknowledging that this agreement was made for his accommodation, without prejudice to the creditor's right by the debtor's enlargement. The issue was tried accordingly, and found for the debtor. Held, that the taking of the body of the debtor in execution was a satisfaction of the debt, at law; and that equity would not enforce the debt against property afterwards coming to the debtor on the death of his wife, by the trusts of the marriage settlement: *Magniac v. Thomson*, 15 How. 281.—s.

of the Statute of Frauds? The Court of Queen's Bench, in *Mountstephen v. Lakeman* (*k*), held that it might be, if at the time the promise was made the promisor and promisee expected that a legal obligation would be incurred by the third person. In that case the plaintiff had been employed to construct a main sewer by a Local Board of Health, of which the defendant was chairman. When the sewer was nearly completed the board gave notice (under 11 & 12 Vict. c. 63, s. 69) to the occupiers of the adjoining houses to connect their drainage within 21 days, or the board would do the work at their expense. Before the 21 days had expired, the plaintiff, having completed the sewer, was about to leave the place with his carts, etc., when the defendant sent after him, and the following conversation took place. The defendant said: "What objection have you to making the connections?" The plaintiff answered: "I have none; if you or the board will order the work, or become responsible for the payment." The defendant replied: "Go on and do the work, and I will see you paid." Plaintiff accordingly did the work under the superintendence of the surveyor of the *board; and sent in the account to the [*111] board debiting them with the amount. The board refused payment on the ground that they had not authorised the order, and after more than two years, the account being still unpaid, the plaintiff brought an action against the defendant. The Court of Queen's Bench thought that the conversation did not amount to an undertaking of the defendant to be primarily liable for the work; but only to a promise that, if the plaintiff would do the work on the credit of the board, the defendant would pay if the board did not; and that this was a promise to be answerable for the debt of

(*k*) L. R. 5 Q. B. 613; 39 L. J. (Q. B.) 275.

another within sect. 4 of the Statute of Frauds, which not being in writing could not be enforced. The Court of Exchequer Chamber however thought that there was evidence on which the jury might have found that the defendant agreed to be primarily liable, and on this ground reversed the judgment of the Queen's Bench (*l*); and the decision of the Exchequer Chamber was subsequently affirmed in the House of Lords (*m*). The affirmative proposition therefore laid down by the Court of Queen's Bench being in the opinion of the Exchequer Chamber not necessary to the decision of the case, and the House of Lords affirming the decision [*112] of the latter, *the proposition itself seems at present still doubtful, so far at least as it is inconsistent with the previous decisions (*n*).

It was at one time thought that a verbal promise, even to answer for the debt of another for which that other remained liable, might be available if founded on an entirely new consideration, conferring a distinct benefit upon the party making such promise. This idea is, however, confuted by Serjt. Williams in his elaborate note to the case of *Forth v. Stanton* (*o*). The rule there laid down by him, which has ever since been approved of, is, that the only test and criterion by which to determine whether the promise needs to be in writing, is the question whether it is or is not a promise to answer for a debt, default, or miscarriage of another, for which that other continues liable (*p*). If it be so, it must be reduced into writing; nor can the considera-

(*l*) L. R. 7 Q. B. 196; 41 L. J. (Q. B.) 67.

(*m*) *Lakeman v. Mountstephen*, L. R. 7 H. L. (E. & I.) 17; 43 L. J. (Q. B.) 188.

(*n*) But see the judgment of Lord *Selborne*, L. R. 7 H. L. (E. & I.) at p. 24; 43 L. J. (Q. B.) 192.

(*o*) 1 Wms. Saund. 211.

(*p*) *Hodgson v. Anderson*, 3 B. & C. (10 E. C. L. R.) 855; *Taylor v. Hilary*, 1 C. M. & R. 741; *Browning v. Stallard*, 5 Taunt. (1 E. C. L. R.) 450.

tion in any case be of importance except in such cases as *Goodman v. Chase*, in which the consideration to the person giving the promise is something which extinguishes the original debtor's liability (*q*).¹ It has

(*q*) You will see Sergt. Williams's criterion approved of in *Green v. Cresswell*, 10 A. & E. (37 E. C. L. R.) 453, and *Tomlinson v. Gell*, 6 A. & E. (33 E. C. L. R.) 564.

¹ To guard against the danger arising from the facility by which loose or ill-remembered words might be tortured into a contract on the part of him who used them, the common law wisely provided that a liability should not depend upon mere words unaccompanied by a consideration for their basis. And as the danger was felt to be the more strong where the words related not to an undertaking by a party for his own benefit, but on behalf of a third person, the fourth section of the Statute of Frauds superadded a writing to the common law requirement of a consideration. Whether such a provision has been conducive of more benefit than harm may well be doubted (see *Holmes v. Knights*, 10 N. H. 176), for the decisions to which it has given rise are as remarkable for their multitude as for the difficulty of their perfect classification.

The cases may naturally be divided into those where the promise of guarantee was concurrent with the principal contract, and those where it was subsequent to its creation.

1. Under the first of these classes, the common law is satisfied wherever the promise is made at the same time as the principal contract, and is an essential inducement to it. No other consideration is necessary than that moving between the creditor and the original debtor: *Kirkby v. Coles*, Cro. Eliz. 137; and it matters not whether the promise be absolute or conditional and dependent upon default of the other: *Leonard v. Vredenburg*, 8 Johns. 29; *Snevily v. Johnston*, 1 W. & S. 307.

The fourth section of the Statute of Frauds, however, altered the common law to this extent,—where the promise is conditional and dependent upon the default of the other, it must be in writing; where, however, it is not thus conditional and dependent, but is direct and absolute, the case rests as at common law, and the statute does not apply. But there is a class of cases which, proceeding upon the suggestion of Mr. Serj. Williams, *supra*, seems to determine that however direct and absolute the contract of the defendant may be, it shall not be deemed to be a direct undertaking, so as to take the case out of the statute, unless all liability is withdrawn from the other party, and thrown entirely upon the shoulders of the defendant; in other words, although there may be a joint contract, yet if the consideration move only to one, unless all the credit is given to the other, the engagement of that other is collateral and not direct; it is, therefore, within the statute, and he is not liable unless his promise and its consideration appear in writing: *Rogers v. Kneeland*, 13 Wend. 114; *Brady v. Sackrider*, 1 Sand. 515; *Cahill v. Bigelow*, 18 Pick. 369; *Elder v. Warfield*, 7 Harr. & J. 397; *Blake v. Parlin*, 22 Me. 395; *Aldrich v. Jewell*, 12 Vt. 126; *Smith v. Hyde*, 19 Ib. 56; *Taylor v. Drake*, 4 Strob. 437; *Ware*

also been considered, that, in order to make the statute applicable, the immediate *object for requiring [*113] the defendant's liability must be, that he shall

v. Stephenson, 10 Leigh, 167; *Rhodes v. Leeds*, 3 Stew. & P. 212; *Faires v. Lodanc*, 10 Ala. 50; *Holmes v. Knights*, 10 N. H. 177; *Proprietors v. Abbott*, 14 Ib. 159.

It has been said, that it may admit of question whether the application of this principle has not been carried too far in some cases, and whether what was in truth, as between the parties, the collateral liability, has not by means of it been transformed into a principal liability, and the real principal debtor thereby discharged through the operation of the statute: *Holmes v. Knights*, 10 N. H. 178; and practically it may often happen that a tradesman, thinking to increase his security by charging the goods to both parties, by that very means, under the application of the rule sanctioned by the weight of authority, loses his remedy against one of them.

It has, moreover, been suggested, upon great apparent soundness of principle (in Mr. Hare's note to *Birkmyr v. Darnell*, 1 Smith L. C. 518, 8th Am. ed.), that the question of the defendant's liability being direct and collateral, is not necessarily wholly dependent upon the withdrawal of all credit from, and the consequent non-liability of, the party who receives the consideration; in other words, that there may be a direct liability, even where the other party is also liable. Thus, where two jointly purchase goods, the liability of one is in no degree lightened by the fact of the other being also liable, nor, where the liability is thus co-extensive, is it changed in any way by the goods being intended for one rather than for the other,—each being still directly liable, the contract cannot be said to be “to answer for the default of another,” and the case would seem to be unaffected by the statute.

Thus, in *Wainwright v. Straw*, 15 Vt. 215, it was held that where a stove was sold to two for the use of one, each was liable, and no writing was necessary. And where the promises are several instead of joint, yet, if each has bound himself directly and absolutely, the mere fact that the consideration moves to one only, ought not, it would seem, to turn into a mere collateral that which was in fact an original contract. “It would scarcely seem,” as was said by Story, J., in *D'Wolf v. Rabaud*, 1 Pet. 500, “a case of a mere collateral undertaking, but rather, if one might use the phrase, a trilateral contract. Each is a direct, original promise, founded upon the same consideration:” *Townsley v. Sumrall*, 2 Ib. 182; *Proprietors v. Abbott*, 14 N. H. 157. Such a view is not, however, recognized by the class of cases first referred to, and in *Taylor v. Drake*, 4 Strob. 437, it was said that to make the delivery of goods to the one also serve as a consideration for the promise of the other, would be to strike down the statutory shield at a blow.

2. Where the promise is given *subsequently* to the creation of the debt, it is evident that the mere existence of that debt cannot, even at common law, be a sufficient consideration for the promise. (See *infra*, notes to page *194.) Another consideration must exist to support the promise, and this may be one of two kinds,—it may either grow out of the debt itself, being connected therewith, such as the forbearance to sue the original debtor, or it may be a new and in-

pay the debt of another if that other does not; and that, consequently, where the immediate object is that

dependent consideration. In the first case, although the promise could be supported at common law, it is within the statute, and a writing is necessary; in the second, the statute does not apply: *Leonard v. Vredenburg*, 8 Johns. 29.

Thus, it is well settled that a forbearance to sue the original debtor, or the discontinuance of a suit already brought, being considerations connected with, and growing out of, the original contract, are, though entirely sufficient at common law, nevertheless within the Statute of Frauds: *Fish v. Hutchinson*, 2 Wils. 94; *Bennett v. Pratt*, 4 Den. 275; *Durham v. Arledge*, 1 Strob. 5; *Nelson v. Boynton*, 3 Metc. 396; *Stone v. Symmes*, 18 Pick. 467. So, when the consideration consists in the performance of the preceding contract, as where a plaintiff having been employed by a contractor to build certain walls for the defendant, refused to go on unless the defendant would promise to pay him, which he did, it was held that the contract was within the statute, for the consideration related merely to the performance of the antecedent contract: *Puckett v. Bates*, 4 Ala. 390.

But where there is some new and original consideration of benefit or harm moving between the new contracting parties, it is well settled that the case is not within the statute: *Leonard v. Vredenburg*, *supra*; as where a promise to pay an existing debt is made in consideration of property placed by the defendant in the hands of the party thus promising: *Hilton v. Dinsmore*, 21 Me. 410; *Todd v. Tobey*, 29 Ib. 219; *Olmstead v. Greenly*, 18 Johns. 12; *Ellwood v. Monk*, 5 Wend. 235; *Hindman v. Langford*, 3 Strob. 207; *Lee v. Fontaine*, 10 Ala. 755; *Hall v. Rodgers*, 7 Humph. 536; or where the party to whom the promise is made relinquishes a levy on the goods of the debtor: *Williams v. Leper*, 3 Burr. 1886; *Castling v. Aubert*, 2 East, 325; *Mercein v. Andrus*, 10 Wend. 461; *Farley v. Cleveland*, 4 Cow. 432; *Tindall v. Touchberry*, 3 Strob. 177; *Dunlap v. Thorne*, 1 Rich. 213; (though two late cases in New York and one in Massachusetts, *Barker v. Bucklin*, 3 Den. 45; *Kingsley v. Balcome*, 4 Barb. 131; and *Nelson v. Boynton*, 3 Metc. 396, seem to hold, in opposition to the prior authorities in the former State, that the consideration must always consist in an advantage to the debtor or the promisor, and that a detriment to the promisee will not take the case out of the statute.)

It has been held in England, and in several of our States, that a promise to indemnify the guarantor against any loss in consequence of his undertaking, is not within the statute, on the ground that the promise is not that another shall perform that which he has undertaken, but that the promisee shall not lose by the engagement into which he has entered: *Thomas v. Cook*, 8 B. & C. 728; *Chapin v. Merrill*, 4 Wend. 657; *Chapin v. Lapham*, 20 Pick. 467; *Peck v. Thompson*, 15 Vt. 637; *Holmes v. Knights*, 10 N. H. 175; *Lucas v. Chamberlain*, 8 B. Mon. 276; *Doane v. Newman*, 10 Mo. 69; *Jones v. Shorter*, 1 Ga. 294; but the more recent cases in England and in New York have not acknowledged this reasoning as satisfactory, "for every promise to become answerable for the debt or default of another may be shaped as an indemnity;" *Green v. Cresswell*, 10 A. & E. (37 E. C. L. R.) 453; *Staats v. Howlett*,

an agent, in selling for a principal, should take unusual care in selecting the customers, and by assuming respon-

4 Den. 559; *Kingsley v. Balcome*, 4 Barb. 131; and the same view was taken in *Draughan v. Bunting*, 9 Ired. 10.—R.

[In a careful opinion by Biddle, J., in the Common Pleas of Philadelphia, the authorities on this last point are considered. Quoting Brown on the Statute of Frauds, he says that the American decisions have resulted "in the rejection by the great preponderance of authority of the doctrine of *Green v. Cresswell*, and the adoption of *Thomas v. Cook*—a result reached after much vacillation on the part of Courts of the same State, and not, it must be confessed, by reference to any satisfactory ground of principle. Indeed, most of the decisions which reject the doctrine of *Green v. Cresswell* waive altogether the question of principle, and put it as a matter settled by authority that the promise to indemnify 'is not within the statute.'"] However, relying upon the English authorities, the case of *Macey v. Childress*, 2 Tenn. Ch. 442. and the opinions of Mr. Brown and Mr. Reed in their works upon this statute, he decides that a promise to indemnify a guarantor is within the statute: *Nugent v. Wolfe*, 14 W. N. C. 290.]

The strong current of the authorities is that if the party to whom the consideration moves becomes personally liable for the payment of the debt, the engagement of any other person, though made at the same time and upon the same consideration, is a promise to pay the debt of another within the statute: 1 Smith's L. C. 527, American note; *Hetfield v. Dow*, 27 N. J. 440; *Rogers v. Kneeland*, 13 Wend. 114; *Aldrich v. Jewell*, 12 Vt. 125; *Cropper v. Pittman*, 13 Md. 190; *Walker v. Richards*, 39 N. H. 259; *Carville v. Crane*, 5 Hill, 483; *Hall v. Farmer*, 5 Den. 484; *Reed v. Holcomb*, 31 Conn. 360; *Boykin v. Dohlonde*, 1 Ala. Sel. Cas. 502. This rule is, in fact, that stated by Serj. Williams in his note to *Forth v. Stanton*, 1 Wms. Saund. 211 a, on the authority of *Matson v. Wharam*, 2 T. R. 80, where Buller, J., though he declared that if it were a new question, the leaning of his mind would be the other way, lays it down broadly "that if the person for whose use the goods are furnished be liable at all, any other promise by a third person to pay that debt must be in writing." "But it may be doubted," says Judge Hare (1 Smith's L. C. 527), "whether any decision has yet gone so far as to refuse to give effect to a direct contract for the purchase of goods merely because one of the purchasers is a surety." The provision of the Statute of Frauds was intended to apply only to contracts strictly of suretyship or guaranty; and where no credit is given to a third person, and the consideration does not move from him, and he is not to be benefited, the statute does not apply, although such third person is primarily liable: *Reed v. Holcomb*, 31 Conn. 360. The promise of one person, though in form to answer for the debt of another, if founded upon a new and sufficient consideration moving from the creditor and promisee to the promisor, and beneficial to the latter, is not within the statute: *Dyer v. Gibson*, 16 Wis. 557. The decisive question is to whom the credit was given: *Boykin v. Dohlonde*, 1 Ala. Sel. Cas. 502. A parol promise to accept an order from a debtor in favour of his creditor, between whom and the promisor there has been no privity, is a promise to pay the debt of another, within the statute: *Plummer v. Lyman*, 49 Me. 229; *Richardson v. Williams*, Ib. 558.—s.

sibility for their solvency should preclude all question of negligence on his part, as where an agent sells on a *del credere* commission, the undertaking so to do need not be in writing (*r*) ; for, although the transaction may terminate in a liability to answer for the debt of another, his paying that debt was not the immediate object of the contract made with him.

The default or miscarriage of another person to which the statute applies need not, however, be a default or miscarriage in payment of a debt or in performing a contract. Any duty imposed by the law, although not the performance of a contract, against the breach of which it was the intention of the parties to secure and be secured, must be proved by writing. Thus, where one had improperly ridden another's horse, and thereby caused its death, a promise by a third person to pay a sum of money in consideration that the owner of the horse would not sue the wrongdoer was adjudged to be unavailable, because in parol only (*s*).

In the case of *Eastwood v. Kenyon* (*t*), the Court of Queen's Bench decided a completely new point on the construction of this branch of the [*114] 4th section. They held that the *promise*, which is to be reduced into writing, is a promise made to the person to whom the original debtor is liable; but that a promise made to the debtor himself, or even to a third person, to answer to the creditor, would not require to be reduced into writing (*u*). In that case, the plaintiff was liable to a Mr. Blackburne on a promissory note,

(*r*) *Couturier v. Hastie*, 9 Exch. 102; 22 L. J. (Exch.) 97, s. c.

(*s*) *Kirkham v. Martyr*, 2 B. & A. 613.

(*t*) 11 A. & E. (39 E. C. L. R.) 438.

(*u*) *Hargreaves v. Parsons*, 13 M. & W. 561; see *Reader v. Kingham*, 13 C. B. N.S. (106 E. C. L. R.) 344; 32 L. J. (C. P.) 108; *Wildes v. Dudlow*, L. R. 19 Eq. 198; 44 L. J. (Ch.) 341.

and the defendant promised *the plaintiff* to discharge the note to Blackburne. The Court held, that this was not a promise to answer for the debt of another within the meaning of the 4th section of the Statute of Frauds.¹

"If," said Lord *Denman*, "the promise had been made to Blackburne, doubtless the statute would have applied; it would have then been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another because the promise is made to that other, viz., the debtor and not the creditor, the statute not having in terms stated to whom the promise contemplated by it is to be made. But upon consideration, we are of opinion, that the statute applies only to *promises made to the person to whom another is answerable*. We are not aware of any case in which the point

¹ "The statute applies only," said Parke, B., in the recent case of *Hargreaves v. Parsons*, 13 M. & W. 569, "to promises made to the persons to whom another is already, or is to become answerable. It must be a promise to be answerable for a debt of, or a default in some duty by that other person *towards the promisee*. This was decided, and no doubt rightly, by the Court of Queen's Bench, *Eastwood v. Kenyon*;" and the same point had been previously decided by the Supreme Court of New York, in *Johnson v. Gilbert*, 4 Hill, 178.—R.

A promise made to a debtor to pay his debt to a third person is not within the statute: *Goetz v. Foos*, 14 Minn. 265; *Britton v. Angier*, 48 N. H. 420; *Brown v. Brown*, 47 Mo. 130; *Barker v. Bradley*, 42 N. Y. 316; *Tibbetts v. Flanders*, 18 N. H. 284. When one agrees to pay for lumber to be furnished to another, this is an original promise: *Weyand v. Crichfield*, 3 Grant, 113; *Backus v. Clark*, 1 Kan. 303. A parol promise to pay the debt of another is binding, where the promiser holds in his hands funds, securities, or property of the debtor: *Fullam v. Adams*, 37 Vt. 391; *Berry v. Doremus*, 30 N. J. 399; *Clymer v. De Young*, 54 Pa. St. 118; *Jennings v. Crider*, 2 Bush, 322; *Wilson v. Bevans*, 58 Ill. 233. When a third person has a lien on property for the payment of his debt, and he gives up his lien to a person who has an interest in the property, upon his promise to pay the debt, such promise is not within the statute: *Luark v. Malone*, 34 Ind. 444; *Hedges v. Strong*, 3 Or. 18; *Ludwick v. Watson*, Ib. 256; *Davis v. Banks*, 45 Ga. 138. A promise by A. to B. in consideration of property delivered to him by B., is, in its relation to the creditors so to be paid, within the Statute of Frauds: *Clapp v. Lawton*, 31 Conn. 95.—s.

has arisen, *or in which any attempt has been made to put that construction upon the statute [*115] which is now sought to be established, and which we think not to be the true one.”

It may be observed here that formerly in determining whether a guaranty had been sufficiently reduced to writing to satisfy the 4th section, the question which most frequently arose was whether the consideration did or did not sufficiently appear upon the written instrument. But now, in the case of promises to answer for the debt, default, or miscarriage of another person, it is no longer necessary that the consideration should appear upon the face of the written memorandum. By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3, no special promise to be made by any person after the passing of this Act (29th July, 1856) to answer for the debt, default, or miscarriage of another person, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document (x).¹

(x) *Glover v. Hackett*, 26 L. J. (Ex.) 416; 2 H. & N. 487.

¹[Note by Mr. J. C. Symons.] In *Kennaway v. Treleaven* the guarantee was thus worded: “Gentlemen, I hereby guarantee to you the sum of £250, in case Mr. P. should default in his capacity of agent and traveller to you.” It was held that the future employment of Mr. P. was the consideration of this promise, and that it sufficiently appeared by inference from the terms of the guarantee. But the case of *Haigh v. Brooks*, 10 A. & E. (37 E. C. L. R.) 309, is the strongest on this point, and has carried the latitude of inference to its extreme length: it was cited in the recent case of *Chapman v. Sutton*, 15 L. J. C. P. 166; and the guarantee was thus worded: “In consideration of your *being in advance* to Messrs. John Lees & Co. in the sum of £10,000, for the

There is a recent case in which a single signature
 [*116] *to an agreement was held under the circumstances to have been made in a double capacity,

purchase of cotton, I do hereby give you my guarantee for that amount (say £10,000) on their behalf;" and it was held, that whether the consideration, "your *being in advance*," was or was not a good consideration, depended upon the transaction to which the guarantee referred. Lord Denman, C. J., remarks: "Being in advance does not necessarily mean that the plaintiff was in advance at the time of the giving of the guarantee. It may have been intended as prospective." The judgment in the Exchequer Chamber was given upon this ground; and Lord Abinger, C. B., said that "there was in the guarantee an ambiguity that might be explained by evidence, so as to make it a valid contract."

Raikes v. Todd, above cited, is a good illustration of an insufficient disclosure of consideration. The guarantee was thus expressed: "Gentlemen, I hereby undertake to secure to you the payment of any sums of money you *have advanced*, or *may hereafter advance*, to Messrs. Davenport & Co., on their account with you, commencing on the 1st November, 1831, not exceeding £2000." Here it was held that the guarantee disclosed no consideration for the *past* advances, and was to that extent invalid, but that it was good as regarded the future advances. Thus, if the guarantee consists of several promises, that which is bad may be rejected without invalidating the remainder of the guarantee. There is no practical difference between past and future considerations, so long as the guarantee discloses a sufficient consideration in law to support the promise (of which see the next lecture). The consideration need not be co-extensive with the promise. (See Raikes v. Todd, per Ld. Denman, C. J.) And the courts will no longer enter into the question of adequacy of the consideration. See Chapman v. Sutton, *supra*, which is the last case where the question of the sufficiency of the inference of a consideration has arisen. See also Lang v. Nevill, 6 Jur. 217, and Johnston v. Nicholls, 1 C. B. (50 E. C. L. R.) 251.

It is permissible to adduce, in evidence of the consideration, the written correspondence between the parties, if that correspondence has been referred to in the guarantee, but not otherwise: see Dobell v. Hutchinson, 3 A. & E. (30 E. C. L. R.) 355, and Higgins v. Dixon, 14 L. J. Q. B. 329.

The rules which govern the construction of contracts, and which will be afterwards considered, of course apply to guarantees. But there is one peculiarity attaching to them, which it may be well to notice here. Guarantees are either for definite or indefinite sums or periods: where they are not limited as to the amount guaranteed, or, being so limited, are in either case intended to affect future transactions until revoked, they are termed continuing guarantees. The distinction between these two classes of guarantees is one of some nicety, and often of importance, as regards the sufficiency of the consideration, which again frequently depends upon whether it be past or prospective.

The only safe rule of construction is to give the words used their natural meaning, taking into account the attendant circumstances which are admis-

viz., as agent for one of the contracting parties, and also independently as a guarantor. The facts were as

sible in evidence to throw light upon the intent of the parties to the instrument. This rule has been recently applied in the case of *Allnutt v. Ashenden*, 5 M. & G. (44 E. C. L. R.) 392, where the guarantee was thus worded: "I hereby guarantee Mr. John Jennings's account with you for wine and spirits, to the amount of £100." This was held to apply to an existing account; "for," said Tindal, C. J., "by account I understand the parties to mean some account contained in some ledger or book; and the case shows that there was such an account existing at that time. The natural construction of the guarantee, therefore, is that it relates to that account." In the subsequent case of *Hitchcock v. Humfrey*, 5 M. & G. (44 E. C. L. R.) 559, the defendant, having guaranteed the payment of goods to be supplied by the plaintiffs to A., up to the 1st of July, gave, on the 9th of April, the following additional guarantee: "In consideration of your extending the credit already given to A., and agreeing to draw upon him at three months from the first of the following month, for all goods purchased up to the 20th of the preceding month, I hereby guarantee the payment of any sum that shall be due and owing to you upon his account for goods supplied." This was held to be a continuing guarantee: the words "following month" and "preceding month" being held to have a general application, the terms of the first guarantee being taken into account in construing the language of the second. For other cases of the construction put on these instruments, see *Mayer v. Isaac*, 6 M. & W. 605; *Jenkins v. Reynolds*, 3 B. & B. (7 E. C. L. R.) 14; *Allan v. Kenning*, 9 Bing. (23 E. C. L. R.) 618; *Batson v. Spearman*, 9 A. & E. (36 E. C. L. R.) 298; *Hargreave v. Smee*, 6 Bing. (19 E. C. L. R.) 244; *Nicholson v. Paget*, 1 Cr. & M. 48; *Martin v. Wright*, 14 L. J. Q. B. 142 [since reported, 6 Q. B. (51 E. C. L. R.) 917]; and *Johnson v. Nicholls*, *supra*.¹

¹ So a guarantee, "If D. wishes to take goods of you, we are willing to lend our names as security for any amount he may wish," was held not to extend beyond the first delivery of goods: *Rogers v. Warner*, 8 Johns. 119. The same construction was given in *Aldricks v. Higgins*, 16 S. & R. 212, where the words were: "L. C. having a desire to enter into trade in a small way, we hereby offer ourselves as security to any gentleman who may feel disposed to give him credit not exceeding \$700, or anything less, as he may think proper to contract;" in *White v. Reed*, 15 Conn. 457; "In any sum my son G. may become indebted to you, not exceeding \$200, I will hold myself accountable;" in *Anderson v. Blakely*, 2 W. & S. 237: "Mr. P. having informed me that he is making some purchases from you, and that you wish some reference, I would say that you might credit him with perfect safety, and that anything he might purchase from you I will see paid for," where the court said: "There is more reason, perhaps, for giving a freer interpretation where the sum is, as in several of the cases, limited, because there the party intrenches himself within a certain amount, beyond which he can in no case be made liable. But when there is no restriction of the amount, the guaran-

follows:—By articles of agreement under seal between J. A. & Co. and Y. & Co., Y. & Co. agreed to do certain work for which J. A. & Co. were to make certain payments, and the agreement contained this clause: “It is further understood between the parties to this contract that J. O. Schuler guarantees payment to Y. & Co. of all moneys due to them under this contract.” The attestation clause was “signed and delivered by the said J. A. & Co. in the presence of C. T.,” and Schuler, acting under a power of attorney, signed as

The cases turn, as remarked by the Lord Chief Justice in that of *Martin v. Wright*, on the particular terms of each guarantee, and it is therefore impossible to lay down any less general rule of construction than that which we have endeavoured to give.

Promises to answer for tortious defaults are within the operation of the statute, as well as guarantees of credit. *Kirkham v. Marter*, 2 B. & Ald. 613, is a leading authority on this point. A. having killed B.'s horse, C. guarantees to B., the owner, to answer for the damage: this was held to be within the statute. Lord C. J. Abbot distinguishes this case from that of *Reed v. Nash*, 1 Wils. 305, but which Serjeant Williams thinks it overrules: 1 Saund. 211, c. n. 1.

Shares in a joint stock company are mere choses in action; but railway shares, it is submitted, inasmuch as they give an interest in land, would fall under the operation of the 4th section.

tee should be carefully scanned, to see whether it justifies a party in the large construction contended for.” And the same view was taken in *Whitney v. Groot*, 24 Wend. 82, upon the words: “We consider I. V. good for all he may want of you, and we will sell him all he reasonably asks of us on credit, and we will indemnify the same.” On the other hand, in *Grant v. Ridsdale*, 2 Harr. & J. 186, “I will guarantee their engagements, should you think it necessary, for any transaction they may have with your house,” was held to be a continuing guarantee till countermanded, but the reasons for the judgment are not reported. Instances of continuing guarantees will be found in *Clark v. Burdett*, 2 Hall, 197; *Mussey v. Rayner*, 22 Pick. 223; *Bent v. Harts-horn*, 1 Metc. 24; *Douglass v. Reynolds*, 7 Pet. 113; *Lawrence v. M'Calmont*, 2 How. 426. As, for example, “Mr. R. is about to establish a store of books and stationery. He will commence on a limited scale with the intention of enlarging the business next spring. He wishes to purchase school-books, &c., on a credit of four or six months, and paper, &c., on commission. For the faithful management of the business, and punctual fulfilment of contracts relating to it, the subscriber will hold himself responsible:” *Mussey v. Rayner*.

While it is undoubtedly true that each case must depend on the particular terms of the guarantee, aided by the attendant circumstances of the parties, it

follows: "P. P. A.—J. A. & Co., J. O. Schuler." Y. & Co. sued Schuler as guarantor, and evidence was

has been often suggested, if not held, that the language should be very strong to justify a court in holding a guarantee to be a continuing one, until notice given to the contrary: per Story, J., in *Cremer v. Higginson*, 1 Mass. 38; *Nicholson v. Paget*, 1 Cr. & M. 48; while, on the other hand, it has been more repeatedly held that the ordinary maxim, that the words of the instrument should be taken most strongly against the party using them, fully applied to guarantees: *Mason v. Pritchard*, 12 East, 227; *Merle v. Wells*, 2 Camp. 413; *Drummond v. Prestman*, 12 Wheat. 515; *Douglass v. Reynolds*, *supra*; *Mayer v. Isaac*, 6 M. & W. 610; where the remarks in *Nicholson v. Paget*, *supra*, are disapproved.

There is an important class of cases upon the subject of notice to the guarantor, the doctrine of which may be said to be almost peculiarly American. It is a rule of the common law, that where a party stipulates to do a certain thing in a certain specific event, which may become known to him, or with which he may make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies in the peculiar knowledge of the opposite party, then notice ought to be given him: *Vyse v. Wakefield*, 6 M. & W. 452. But in the case of *Russell v. Clark*, 7 Cranch, 69, *Edmondston v. Drake*, 5 Pet. 624, this principle was, in its application to mercantile guarantees, thought rather an obligation of commercial than of the common law, and in the subsequent case of *Douglass v. Reynolds*, 7 Ib. 113, which is a leading case upon the subject, this view was directly sanctioned, and it was held that notice of the acceptance of a guarantee, and of the giving credit under it, must be given to the guarantor immediately or within reasonable time (unless, indeed, in the case of a continuing guarantee, when it would not be necessary to give notice of each successive transaction as it arose, but after the transactions were closed, notice of the whole amount for which the guarantor was held responsible should be given to him within a reasonable time); and further, that demand of performance must be made upon the principal, and immediate notice of his default given to the guarantor, and that a failure so to do would discharge the latter, unless it be clearly made out that under the circumstances of the case no injury had resulted to him from the neglect. This rule has been frequently affirmed by the Supreme Court of the United States, and adopted in most of the States, and the student will find the authorities collected and their distinctions classified in the first volume of *American Leading Cases*, p. 50, note to *Douglass v. Reynolds*. Some of the authorities where the subject is most elaborately discussed, are *Craft v. Isham*, 13 Conn. 28; *Wildes v. Savage*, 1 Sto. 22; *Howe v. Nickels*, 22 Me. 175. In many of the cases notice would have been necessary under the common law rule referred to, but the authorities have based them upon the principles of commercial law.

In New York, however, dissent from this doctrine of notice has been expressed in *Douglass v. Howland*, 24 Wend. 35; *Whitney v. Groot*, Ib. 82; *Smith v. Dann*, 6 Hill, 543; *Curtis v. Brown*, 2 Barb. 51; *Union Bank v. Coster*, 3 N. Y. 203. In the first of these cases the defendant's agreement was such

given at the trial of statements by Schuler at the time of execution that he intended to sign on his own behalf

(viz. that one B. should faithfully perform an agreement with the plaintiff to account and pay over all such sums as should be found due from him to the latter), as would not have required notice under any circumstance, as the events to which it referred, though prospective, were not dependent on the option of the plaintiff; but the court held that as a general rule, when nothing on the face of the guarantee required notice, the court could not exact one as a condition precedent to a recovery. In the opinion of the annotator referred to, the weight of reasoning lies between these two classes of cases, and points to the following rule: that in all cases in which the contract of a guarantor does not determine precisely the nature and the amount of liability for which he is willing to make himself responsible, and leaves either or both these points to the choice of the person who seeks to enforce the guarantee, the latter is bound to give notice of the mode in which he has exercised the election thus accorded him, and cannot complain that there has been a default on the part of the defendant before giving him precise information as to what is necessary to be done in order to fulfil his engagements; but that when the defendant's contract, instead of leaving open the cause of action upon which he is willing to make himself liable, points out some mode of performance, in consideration of which he is willing to be bound, either directly or on behalf of another person, an action will lie without notice as soon as the consideration has been performed.

Notwithstanding a few decisions or dicta to the contrary, 2 M'Lean 21, Ib. 369, Ib. 557, the weight of authority has unquestionably settled, that however necessary notice may be to a recovery, it need not be averred in the declaration: *Gibbs v. Cannon*, 9 S. & R. 198; *Rhett v. Poe*, 2 How. 485; *Salisbury v. Hale*, 12 Pick. 424; *Dole v. Young*, 24 Ib. 250; *Wildes v. Savage*, 1 Sto. 22; inasmuch as the want of notice will only operate as a defence to the guarantor where it has resulted in some actual injury to him, and is different in its operation in this respect from the notice required to charge an endorser of a negotiable instrument, in which case the rule is inflexible and open to no inquiry whether notice could have availed him or not, as in either case the endorser is absolutely discharged.

Before leaving the subject of guarantees, it may be remarked that in Pennsylvania, a peculiar signification has been given to the word *guarantee*, as distinguished from other words of similar import, such as "agree to become answerable," or the like, and a guarantee of a debt due by another, merely imports an undertaking that the debt is susceptible of collection, and the guarantor is not liable until the insolvency of the principal is shown. Such a course of decision, though it has been sometimes regretted, is firmly established by a class of cases: *Johnston v. Chapman*, 3 P. & W. 18; *Isett v. Hoge*, 2 Watts, 128; *Snevily v. Ekel*, 1 W. & S. 204; *Parker v. Culvertson*, 1 Wall. Jr. 161.—R.

A guarantor may specify in the letter of credit the terms on which he will be bound; and if these terms are complied with he is bound, though the law would have prescribed the performance of other acts by the party seeking to

as well as on that of J. A. & Co. A verdict was found for the plaintiffs. Schuler moved for a new trial, on the ground that on the face of the agreement he had not signed on his own behalf, and that the evidence was inadmissible to show that he had. It was held, however, by the Court of Appeal, affirming the decision of the Queen's Bench Division, that, there being an ambiguity on the face of the contract as to the capacity in which Schuler signed, evidence that the latter intended to sign in his own right as well as *on behalf of J. A. & Co. did not contradict the document, and was admissible, and that Schuler must be taken to have signed in the double capacity of agent and guarantor (y). [*117]

There is one thing which, though collateral to the Law of Contracts, relates so peculiarly to this branch of the Statute of Frauds, that I think it ought to be mentioned. After the 4th section of the Statute of Frauds had rendered verbal guaranties unavailable, actions upon the case for *false representations*, under circumstances in which, before the Act, the transaction would have been looked on as one of guaranty, were

(y) *Young v. Schuler*, 11 Q. B. D. 651.

subject him on his guarantee. Therefore a guarantor undertaking to pay on receiving reasonable notice of the failure of the principal debtor to pay, dispenses with notice of the acceptance of the guarantee, even if the law would have required such notice: *Wadsworth v. Allen*, 8 Gratt. 174. See also *Baker v. Rand*, 13 Barb. 152; *Spicer v. Norton*, *Ib.* 542; *Bickford v. Gibbs*, 8 Cush. 154; *Klein v. Currier*, 14 Ill. 237; *Farmers' and Mechanics' Bank v. Kercheval*, 2 Mich. 504.

As to the necessity of notice of acceptance of the guarantee, see *Unangst v. Hibler*, 26 Pa. St. 150; *Lawton v. Maner*, 9 Rich. 335; *Yancy v. Brown*, 3 Sneed, 89; *M'Dougal v. Calef*, 34 N. H. 534; *Kellogg v. Stockton*, 29 Pa. St. 460; *Cahuzac v. Samini*, 29 Ala. 288; *Bright v. M'Knight*, 1 Sneed, 158; *Wardlaw v. Harrison*, 11 Rich. 626; *Paige v. Parker*, 8 Gray, 211; *McNaughton v. Conkling*, 9 Wis. 316; *Powers v. Bumcratz*, 12 Ohio St. 273; *Maynard v. Morse*, 36 Vt. 617.—s.

often brought. For instance, if A. went to a tradesman to persuade him to supply goods to B., by assuring him that he should be paid for them, the tradesman, in case of B.'s default, could not bring an action of assumpsit as upon a guaranty, because there was no written memorandum of what passed; but he brought an action on the case, in which he accused A. of having knowingly deceived him as to B.'s ability to pay: and if the jury thought this case made out, he succeeded in his action, and received pretty nearly the same sum as he would have done if there had been a guaranty. However, as this was inconsistent with the object of the Statute of Frauds, the legislature put an end to it by enacting, in statute 9 Geo. IV. c. 14, s. 6, commonly called Lord

[*118] *Tenterden's Act (which, however, is not confined to cases within the Statute of Frauds) (z), "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (a), unless such representation or assurance be made in writing, signed by the party to be charged therewith." ¹

(z) *Devaux v. Steinkeller*, per Tindal, C. J., 6 Bing. N. C. (37 E. C. L. R.) 88.

(a) It was probably intended that the words "money or goods upon," which were added in the Committee upon the Bill, should precede the word "credit."

¹ It appears that statutes similar to this section of Lord Tenterden's Acts have been adopted in Alabama, California, Indiana, Kentucky, Maine, Massachusetts, Michigan, Missouri, Oregon, South Carolina, Vermont, Virginia, and Wyoming Territory. In some of these statutes is incorporated the provision that the party shall be bound by the signature of an agent duly authorized to sign. See the acts collected in the Appendix of Statutes to Mr. Reed's Work on the Statute of Frauds. It has been held that the existence of fraud will take the case out of the statute: *Warren v. Barker*, 2 Duv. 156; *Sims v. Eiland*,

A trader being in bad circumstances and indebted to the defendant, applied to plaintiff for goods on credit, and referred him to defendant for her character; in fact, she had dealt with defendant to a considerable amount but had fallen into arrear, and defendant had ceased to supply her for some time, but had gone on again upon her undertaking to discharge her arrears at so much per week. The plaintiff inquired of the defendant's shopman as to her credit, and defendant, on being referred to by the shopman, said, that he might give her a fair character, which the shopman repeated to the plaintiff, and he thereupon trusted her with goods. These goods she sold, and paid defendant with the *proceeds, but never paid the plaintiff. The Court of [*119] King's Bench decided that evidence of the defendant's representation through his shopman to the plaintiff could not be admitted, not having been made in writing (b).

It has since been considered in the construction of this statute, that a representation by a person, that the title-deeds of an estate which A. had bought were in that person's possession, that nothing could be done with the estate without his knowledge, and consequently that the plaintiff would be safe in lending money to A., was a representation made concerning A.'s ability; and, therefore, as it was not in writing, the defendant was not liable on account of its falsehood (c). It has also been considered that a representation by a partner as to the credit of a firm in which he was a partner is a repre-

(b) *Haslock v. Ferguson*, 7 A. & E. (34 E. C. L. R.) 86.

(c) *Swan v. Phillips*, 8 A. & E. (35 E. C. L. R.) 457.

57 Miss. 607; but the fact that the party making the representation will derive benefit from the credit given is not, of itself, sufficient to raise a conclusive presumption of fraud: *Pearson v. Seligman*, 48 L. T. N. S. 482; *Mann v. Blanchard*, 2 Allen, 386. See also *McLean v. Dun*, 1 Ont. App. 153; *St. John v. Hendrickson*, 81 Ind. 350; *Hunter v. Randall*, 62 Me. 423.

sentation as to the credit of another person within the meaning of the statute (*d*).

In *Wade v. Tatton*, which was decided in the Court of Exchequer Chamber, that Court determined that where a written representation is made as to the character of a third person, and also a parol representation of the character of the same person, and the person deceived thereby trusted to both representations, and would not have trusted to either of them alone, that the party deceived *thereby may maintain an action [*120] —a material part of the representation having been made in writing (*e*).

The effect of this section (of Lord Tenterden's Act) was also much discussed in the great case of *Lyde v. Barnard* (*f*), in which the Judges of the Court of Exchequer differed, but the judgments in which will repay a very attentive perusal.

It has been held that, although under the above section of Lord Tenterden's Act, the signature of an agent generally is not sufficient, yet that in the case of a banking company formed under 7 Geo. IV., c. 46, the signature of the manager is the signature, not merely of an agent, but of the company itself, and therefore "the signature of the party to be charged" within that section (*g*). In the case just cited, it did not appear that there was any other mode of signing by the bank except by the manager.

The third of the species of contracts enumerated by the 4th section, and required by it to be evidenced in writing is—*any agreement made in consideration of marriage*.

(*d*) *Devaux v. Steinkeller*, 6 Bing. N. C. (37 E. C. L. R.) 84.

(*e*) 25 L. J. (C. P.) 240; 18 C. B. (86 E. C. L. R.) 371.

(*f*) 1 M. & W. 101.

(*g*) *Swift v. Winterbotham*, L. R. 8 Q. B. 244; 42 L. J. (Q. B.) 111.

It certainly would strike any one (except, perhaps, a lawyer) that a promise by a woman to marry a man, in consideration of his promise to marry her, was an agreement made in *consideration of marriage. And, indeed, in *Philpott v. Wallet* (*h*), it was expressly so decided. That was an action of *assumpsit* for breach of promise of marriage, in which the jury found the promise, and found also that it had not been reduced to writing. And it was objected, "that this is no promise within the Statute of Frauds and Perjuries, for that must be intended of promises to pay money upon marriages, and not of promises to marry." But the report proceeds to say that to this it was answered and resolved, that this promise is directly within the words of the statute, and not out of the intent, because the promise is, that in consideration the one would marry the other, the other would marry him. However, as Lord Coke has observed, the reason of the law is not always like a man's natural reason; and, accordingly, the case of *Philpott v. Wallet* has been overruled by *Cork v. Baker* (*i*), and it has been decided by that case, and *Harrison v. Cage* (*k*), that an agreement between two persons to marry is not an agreement in consideration of marriage, within the meaning of this enactment, but that these terms are confined to promises to do something in consideration of marriage, other than the performance of the contract of marriage itself.¹

(*h*) 3 Levinz, 65.(*i*) 1 Str. 34.(*k*) 1 Ld. Raym. 386.

¹ The doctrine of these cases was affirmed in *Ogden v. Ogden*, 1 Bland, 287, and *Clark v. Pendleton*, 20 Conn. 508.—R.

Other cases are *George v. Barton*, 7 Watts, 532; *Crane v. Gough*, 4 Md. 322; *Withers v. Richardson*, 5 Mon. 94; *Blackburn v. Mann*, 85 Ill. 222; *Short v. Stotts*, 58 Ind. 36; *Morgan v. Yarborough*, 5 La. Ann. 316. But it has been held that a contract to marry in five years is within the prohibition of the statute in regard to parol contracts not to be performed within a year: *Derby v. Phelps*, 2 N. H. 516; see also *Houghton v. Houghton*, 14 Ind. 505.

Thus a promise made by the intended husband to the intended wife before marriage to settle her *personal property on her, will not be carried into effect by the Court of Chancery unless evidenced by writing (*l*). But if so evidenced it would be otherwise, although the writing acknowledged the promise to have been made before the wedding, but it was, in fact, made after (*m*). And where a promise was made by a testator to the intended husband of his daughter, previous to her marriage, that she should share in the testator's property equally with the rest of his children, and the daughter married the plaintiff, and died in the testator's lifetime, leaving issue, but the testator, who had not given anything to the daughter on her marriage, gave by his will a legacy to one surviving daughter, and bequeathed the residue of his property to another, leaving nothing to his deceased daughter or to the plaintiff, her husband, it was held that the promise of the testator to the plaintiff, although verbal only, yet being repeated in terms in an affidavit made by the testator in a former legal proceeding against the plaintiff, the affidavit was a sufficient compliance with the requirements of the statute (*n*).

We now come to the fourth class of promises, enumerated by the 4th section, viz.—*any contract, [*123] *or sale of lands, tenements, or hereditaments, or any interest in or concerning them.*

These words, you will observe, are exceedingly large, comprehending not merely an interest *in* land itself, but any interest *concerning* it.¹ And the main questions

(*l*) Countess of Montacute v. Maxwell, 1 Str. 236; 1 P. Wms. 618; Tweddle v. Atkinson, 30 L. J. (Q. B.) 265.

(*m*) *Ib.*; s. v. Randall v. Morgan, 12 Ves. 73.

(*n*) Barkworth v. Young, 26 L. J. (Ch.) 153; Hammersley v. De Biel, 12 C. & Fin. 45.

¹ An oral promise to pay presently the price of lands conveyed at the time

which have arisen have accordingly been—Whether particular contracts, falling very near the line, do or do not *concern land*, so as to fall within these terms. Thus it was held in *Crosby v. Wadsworth* (*o*), that an agreement conferring an exclusive right to the vesture of land (*i. e.*, a growing crop of mowing grass), during a limited time and for given purposes, is a contract for sale of an interest in, or at least *concerning* lands; and for the non-performance of which, if made by parol, an action cannot be maintained. In *Tyler v. Bennett* (*p*), an agreement that the plaintiff should be allowed to take water from a particular well was held to concern land, and to require a writing.¹ On the other hand, in *Evans v. Roberts* (*q*), where the plaintiff had sold to the de-

(*o*) 6 East, 602; *Carrington v. Roots*, 2 M. & W. 248.

(*p*) 5 A. & E. (31 E. C. L. R.) 377.

(*q*) 5 B. & C. (11 E. C. L. R.) 829.

to the promisor is not within the statute: *Basford v. Pearson*, 9 Allen, 387; *Holland v. Hoyt*, 14 Mich. 238; *Calhoun v. Atchinson*, 4 Bush, 261.—s.

¹ So of a right of permanently overflowing the land of another: *Harris v. Miller*, 1 Meigs, 153, or erecting a permanent mill-dam: *Stevens v. Stevens*, 11 Metc. 251; *Thompson v. Gregory*, 4 Johns. 81.—R.

So a right to dig and carry away ore: *Riddle v. Brown*, 20 Ala. 415; *Briles v. Pace*, 13 Ired. 279. [A leasehold interest in an oil well has been held to be within the act: *Henry v. Colby*, 3 Brewster, 175; and also in a salt well: *M'Dowell v. Delap*, 2 Marsh. 33.] An agreement not to claim damages for flowing one's land, if the other party will erect a dam and mill, is not the conferring of any right, interest or easement in land, but only a waiver of claim for pecuniary damages, and need not be in writing: *Smith v. Goulding*, 6 Cush. 154. The right to overflow another's land by a mill-dam is an interest in land which cannot pass by parol: *Carter v. Harlan*, 6 Md. 20. A license by the owner of a fee of a highway: *Brown v. Galley, Hill & Den*. 308; *Hall v. M'Leod*, 2 Metc. (Ky.) 98. So a license to flow lands: *French v. Owen*, 2 Wis. 250. So a right to maintain a dam on the land of another: *Moulton v. Faught*, 41 Me. 298; *Trammell v. Trammell*, 11 Rich. 471. No deed or other writing is necessary to convey the interest of the owner of a building standing on another's land: *Keyser v. School District*, 35 N. H. 477. A license to insert beams in the wall of a house is not within the statute: *McLarney v. Pettigrew*, 3 E. D. Sm. 111. So an agreement to take a certain annual compensation for damages occasioned by flowing land by a mill-dam: *Short v. Woodward*, 13 Gray, 86. So the grant of a right to float logs on a stream: *Rhodes v. Otis*, 33 Ala. 578.—s.

fendant a growing crop of potatoes, this was decided not to be a sale of any *interest in or concerning land*. It was contended, that, as the potatoes were deriving nourishment and support from the soil, and would have passed as part of the land by a conveyance of it, an interest in them must at all events be taken to *concern* land; and *great reliance was placed on the decision in *Crosby v. Wadsworth*, which I have already cited; where a growing crop of grass was sold and was to be mowed by the vendee, and the sale was held to fall within the statute, and to require a writing. However the Court held that that case was distinguishable. "Although," said Mr. Justice *Holroyd*, "the vendee might have had an incidental right by virtue of his contract to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in the land within the meaning of this statute: he clearly had no interest so as to entitle him to the possession for any period, however limited, for he was not to raise the potatoes. Besides, this is not a contract for the sale of the produce of any specific part of the land, but of the produce of a cover of land. The plaintiff did not acquire by the contract any interest in any specific portion of the land; the contract only binds the vendor to sell and deliver the potatoes at a future time at the request of the buyer, and he was to take them away."

With regard to this case, it is worth while to observe, that though, according to the decision of the Court, the contract did not fall within the 4th section, as the sale of an interest in or concerning lands, yet it would clearly fall within the 17th, to which, before the conclusion of these Lectures, I shall have occasion to advert, as being a sale of *goods and chattels; but no point arose

[*125] upon that section, because one shilling had been

paid as *earnest money*, which is one of the modes of satisfying the provisions of the 17th section.

The result of these cases, and of the many others which have been decided on the subject, is thus stated in Williams' Saunders (*r*): It appears to be now settled, that, with respect to emblements or *fructus industriales* (*i. e.*, the corn and other growth of the earth, which are produced, not spontaneously, but by labour and industry), a contract for the sale of them while growing, whether they are in a state of maturity, or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods: Evans *v.* Roberts (*s*); Sainsbury *v.* Mathews (*t*). And it will make no difference whether they are to be reaped or dug up by the buyer or by the seller: Jones *v.* Flint (*u*).¹ The true question is, whether, in order to

(*r*) Duppa *v.* Mayo, 1 Wms. Saund. 277 c. n (*f*). A similar and very clear view of this subject is also taken by Lord St. Leonards—see Concise View of Law of V. & P. 75, ed. 1851.

(*s*) 5 B. & C. (11 E. C. L. R.) 829.

(*t*) 4 M. & W. 343.

(*u*) 10 A. & E. (37 E. C. L. R.) 753.

¹ In Evans *v.* Roberts (which was approved in Dunne *v.* Ferguson, 1 Hayes, Exch., 542, where is an able opinion by Joy, Ch. Baron), the case of Emmer-son *v.* Heelis, 2 Taunt. 38, was virtually overruled, and Waddington *v.* Bristow, 2 B. & P. 452, endeavoured to be explained. These cases decided that a sale of growing turnips and hops was within the fourth section of the statute. In Rodwell *v.* Phillips, 9 M. & W. 501, Lord Abinger suggested that the difference appeared to be between annual productions raised by the labour of man, and the annual productions of nature, not referable to the industry of man, except at the period when they were first planted; which, together with the disapprobation expressed of Waddington *v.* Bristow, *supra*, would seem to determine that an annual crop is not within the fourth section of the statute; and it seems to be generally held, on this side of the Atlantic, that such a crop is personal property, and as such can be sold by the owner or taken in execution: Newcomb *v.* Rayner, 2 Johns. 430 n.; Whipple *v.* Foot, Ib. 418; Stewart *v.* Doughty, 9 Ib. 108; Austin *v.* Sawyer, 9 Cow. 39; Stambaugh *v.* Yeates, 2 Rawle, 161; Myers *v.* White, 1 Ib. 356; Bank of Pennsylvania *v.* Wise, 3 Watts, 406; Penhallow *v.* Dwight, 7 Mass. 34; Cutler *v.* Pope, 13 Me.

effectuate the intention of the parties, it be necessary to give the buyer an interest in the land, or whether an

377; *Craddock v. Riddlesbarger*, 2 Dana, 205; *Brittain v. McKay*, 1 Ired. 265; *Green v. Armstrong*, 1 Den. 556; though, if not severed, it would pass by a conveyance or devise of the land: *Bank of Pennsylvania v. Wise*, 3 Watts, 406; *Sallade v. James*, 6 Pa. St. 144; *Bear v. Bitzer*, 16 Pa. St. 175; *Groff v. Levan*, Ib. 179; and in the last two cases it was suggested that the reason why a previous sale of the grain would defeat the right of a subsequent purchaser of the land was because such sale was an implied severance of the grain.

The weight of authority would also seem to determine that trees, sold as timber, and to be presently cut and delivered, or trees and plants growing in a nursery, to be presently transplanted, are also personal property: *Anon*, Ld. Raym. 182; *Smith v. Surnam*, *supra*; *Erskine v. Plummer*, 7 Me. 447; *Miller v. Baker*, 1 Metc. 27; *Whitmarsh v. Walker*, Ib. 313; *Claffin v. Carpenter*, 4 Ib. 580; *Yale v. Seely*, 15 Vt. 221. But when the property in the trees is not to pass until they be severed, or if time is to be allowed for them to reach maturity, it would seem that the sale is one of an interest in land, and not of a chattel: *Putney v. Day*, 6 N. H. 430; *Green v. Armstrong*, 1 Den. 550; *Pierrepont v. Barnard*, 5 Barb. 364. Manure has been held to be part of the realty, whether heaped in a barnyard or spread upon the ground: *Wetherbee v. Ellison*, 19 Vt. 379.

It may be here remarked, that even if the contracts referred to do not fall within the fourth section of the statute, because not relating to an interest in land, they must necessarily fall within the seventeenth section, because they relate to chattels. Moreover, if the contract is an entire one, as for the sale of the realty with the crops growing upon it, a court has no right to apportion it; and if the sale of the realty be avoided by this statute, that of the personalty will also fall: *Thayer v. Rock*, 13 Wend. 53; *Loomis v. Newhall*, 15 Pick. 166.—R.

A verbal contract to pay for improvements on land, held adversely to the promisor, in consideration that the tenant would attorn to him and pay him rent for his unexpired term, is not within the statute: *Cassill v. Collins*, 23 Ala. 676. A sale of growing timber, with liberty to enter, cut, and carry it away, without limitation of time, is an interest in land within the Statute of Frauds: *Buck v. Pickwell*, 27 Vt. 157; *Yeakle v. Jacob*, 33 Pa. St. 376; *M'Gregor v. Brown*, 10 N. Y. 114; *Harrell v. Miller*, 35 Miss. 700; *Hutchins v. King*, 1 Wall. 53. A sale of standing trees, in contemplation of their immediate separation from the soil, is a constructive severance of them. It is distinguished from the case of a contract conferring an exclusive right to the land for a time, for the purpose of making a profit out of the growth upon it: *Byassee v. Reese*, 4 Metc. (Ky.) 372. Crops grown and ready to be cut are chattels, and will pass by parol: *Bryant v. Crosby*, 40 Me. 9; even before their maturity: *Bricker v. Hughes*, 4 Ind. 146; *Sherry v. Picker*, 10 Ib. 375; *Bull v. Griswold*, 19 Ill. 631; *Matlock v. Fry*, 15 Ind. 483; *Frank v. Harrington*, 36 Barb. 415; *Marshall v. Ferguson*, 23 Cal. 65. A. agreed to sell and deliver to B. all the broom corn that should be raised in 1853, on twenty-five acres of

easement of the right to enter the land for the purpose of harvesting and carrying them away is all that was intended to be granted *to the buyer. But with respect to grass, which, as being the natural produce of the land, is said to be not distinguishable from the land itself in legal contemplation until actual severance, the decision of *Crosby v. Wadsworth* appears to be still adhered to, viz., that the purchaser of a crop of mowing grass, unripe, and which he is to cut, takes an exclusive interest in the land before severance; and therefore the sale is a sale of an interest in land within the statute (x). So it has been held, that the sale of growing underwood to be cut by the purchaser confers an interest in land within the statute (y). The same has been held as to an agreement for the sale of growing fruit (z). But where the owner of trees growing on his land (but after two had been cut down) agrees with another while the rest are standing to sell him the timber, to be cut by the vendor, at so much per foot, this is a contract merely for the sale of goods (a). The timber was to be made a chattel for the seller (b). And, *per Littledale, J.*, even if the contract were for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, this would not give him an in-

(x) *Carrington v. Roots*, 2 M. & W. 248.

(y) *Scorell v. Boxall*, 1 Y. & J. 396; *Teal v. Auty*, 2 B. & B. (6 E. C. L. R.) 99.

(z) *Rodwell v. Phillips*, 9 M. & W. 501.

(a) *Smith v. Surman*, 9 B. & C. (17 E. C. L. R.) 561.

(b) *Lord Falmouth v. Thomas*, per *Bailey, B.*, 1 C. & M. (41 E. C. L. R.) 105.

land—held within the statute: *Bowman v. Conn*, 8 Ind. 58. Coals and the right to dig them is an interest in land: *Lear v. Chouteau*, 23 Ill. 39. As to growing timber see *Hutchings v. King*, 1 Wall. 53; *Byassee v. Reese*, 4 Metc. (Ky.) 372; *Kingsley v. Holbrook*, 45 N. H. 313; *Huff v. McCauley*, 53 Pa. St. 206. As to growing crops see *Marshall v. Ferguson*, 23 Cal. 65; *Webster v. Zielly*, 52 Barb. 482.—s.

[*127] terest in the land within the *meaning of the statute (c).¹ Thus, too, a sale of growing timber to be cut down by the purchaser and taken away by him as soon as possible is not a sale of an interest in land within the meaning of this section, but of goods within the meaning of the 17th section (d). In another case on this subject where the plaintiff and defendant orally agreed (in August) that the defendant should give £45 for the crop of corn on the plaintiff's land, and the profit of the stubble afterwards, that the plaintiff was to have liberty for his cattle to run with the defendant's, and that the defendant was also to have some potatoes growing on the land and whatever lay grass was in the fields, and the defendant was to harvest the corn and dig up the potatoes, and the plaintiff was to pay the tithe; it was held, that it did not appear to be the intention of the parties to contract for any interest in land, and the case was not, therefore, within the statute, but a sale of goods as to all but the lay grass, and as to that a contract for the agistment of the defendant's cattle (e).

(c) 9 B. & C. (17 E. C. L. R.) 573; *Evans v. Roberts*, 5 B. & C. (11 E. C. L. R.) 829.

(d) *Marshall v. Green*, 1 C. P. D. 35; 45 L. J. (Q. B., etc.) 153.

(e) *Jones v. Flint*, 10 A. & E. (37 E. C. L. R.) 753; *Duppa v. Mayo*, 1 Wms. Saund. 277 c, n. (f).

¹ In *Brown v. Morris*, 83 N. C. 251, the parties entered into a parol agreement by which one A was to make bricks upon the land of the plaintiff, the property in the bricks to remain in the plaintiff until he was paid for the clay and wood used in their manufacture. A sold the bricks to defendant, who was then sued for the price by the plaintiff. He endeavoured to defend on the ground *inter alia* that the parol contract between the plaintiff and his vendor was void. But the Court held it valid, and Smith, C. J., said: "The land on and from which the bricks were manufactured belonged to the plaintiff, and it was perfectly competent for him to agree that the property should remain unchanged and follow the material into the manufactured article. The Statute of Frauds has no application to a contract concerning personalty, which the brick became, and which but leaves the title where it was, in the owner of the soil."

Upon very similar reasoning, when a tenant having a right to remove fixtures, left them in the house upon a parol agreement with the landlord that he should take them at a valuation, the Court *were quite [*128] satisfied that this was not a sale of any interest in land (*f*).¹

Neither does an agreement for board and lodging amount to a contract for an interest in land; and a person having agreed with a boarding-house keeper for board and lodging for himself and servant, and accommodation for a horse, for £200 a year, and having afterwards refused to enter on the occupation, was held liable to an action, although the whole that passed between them was by word of mouth. The agreement was merely that the proposed lodger should become and be received as an inmate in the house and family (*g*).

But an agreement to occupy lodgings at a yearly rent, the occupation to commence at a future day, is an agreement for an interest in land within the 4th section (*h*).

And such also is an agreement, that, if one will take possession of a house and become tenant upon its being properly furnished, the other will furnish it properly (*i*). So also an agreement between one who desired to obtain the transfer of the lease of a public-house and a public-house broker who had no interest in the public-house

(*f*) *Hallen v. Runder*, 1 C. M. & R. 266; *Lee v. Gaskell*, 1 Q. B. D. 700; 45 L. J. (Q. B., etc.) 540.

(*g*) *Wright v. Stavert*, 29 L. J. (Q. B.) 161.

(*h*) *Inman v. Stamp*, 1 Stark. N. P. C. (2 E. C. L. R.) 12.

(*i*) *Mechelen v. Wallace*, 7 A. & E. (34 E. C. L. R.) 49; *Vaughan v. Hancock*, 3 C. B. (54 E. C. L. R.) 766.

¹ As to what constitute fixtures, discussion of which would be out of place here, the student is referred to the case of *Elwes v. Mawe*, 2 Smith's L. C. (8th Am. ed.) 191 and the notes.

[*129] himself, that the *latter would procure him the lease, has been held to be a contract or sale of an interest in land within the 4th section (*k*).

Such also was considered an agreement on the sale of a milk-walk for £80, in which it was agreed that the purchaser should go into and occupy the premises of which the vendor was tenant, and should be tenant of them from Midsummer then past, and should pay the rent, rates, and taxes. The defendant entered, but finding the business not so extensive as he expected, refused to pay the whole of the £80. The Court considered that the plaintiff agreed to consign his interest in the premises, such as it was, to the defendant, and the latter agreed to pay the rent, rates, and taxes, from the last quarter, and that it was, therefore, expressly within the statute (*l*).

The same conclusion has been come to where one entered into an agreement with another to relinquish, and give possession to him of a furnished house for the residue of a term which the former had therein, in consideration of a sum of money to be paid by the latter for certain repairs to be done to the house. It was considered that the contract was not merely that one side should repair and relinquish possession, and the other pay the money for the repairs, but that the relinquishment being *for the remainder of a term, an assignment was contemplated, which was clearly an interest in land (*m*). The law is the same whether the interest agreed to be assigned or parted with be legal or equitable (*n*). And the same rule that the contract cannot be enforced unless in writing applies, al-

(*k*) *Horsley v. Graham*, L. R. 5 C. P. 9; 39 L. J. (C. P.) 58.

(*l*) *Smart v. Harding*, 24 L. J. (C. P.) 76; 15 C. B. (80 E. C. L. R.) 652.

(*m*) *Buttemere v. Hayes*, 5 M. & W. 456; *Cocking v. Ward*, 1 C. B. (50 E. C. L. R.) 858.

(*n*) *Kelly v. Webster*, 21 L. J. (C. P.) 163; 12 C. B. (74 E. C. L. R.) 283.

though the consideration for the defendant's part of the contract has been performed, and nothing remains to be done but the payment of the money (o).

But when a contract was that, in consideration that the plaintiff would advance £2000 upon the security of a mortgage of certain land upon the defendant making out a good title to mortgage it, the defendant promised to pay him the expenses to which he might be subjected, in case the loan should go off by reason of the defendant changing his views or of the defectiveness of the defendant's title, the Court of Exchequer clearly held that the contract merely related to the investigation of the title, and did not relate to any interest in land (p).

A promise founded on a valuable consideration to make a will leaving an interest in land is within the 4th section, and cannot be enforced against *the [131] estate of the promiser in the absence of a writing (q).

Again, a contract professing to give a right to go over certain land and kill game there, and to take away a fourth of the game shot, is a contract for a profit *a prendre*, and, therefore, for an interest in land, and so must be in writing to satisfy this section (r).

In all these cases, however, the observation applies which I have made in the former Lecture with reference to cases falling within this section in general. The contract, even if by mere *words*, is not void, but merely incapable of being enforced by action (s). And there-

(o) *Cocking v. Ward*, *supra*; *Kelly v. Webster*, *supra*. See ante, p. *99, as to the effect of part performance, according to the rules of Equity.

(p) *Jeakes v. White*, 21 L. J. (Ex.) 265; 6 Ex. 873.

(q) *Alderson v. Maddison*, 5 Ex. D. 293; 49 L. J. (Q. B.) 801; 7 Q. B. D. 174; 50 L. J. (Q. B.) 466; *Maddison v. Alderson*, 8 App. Cas. 467; 52 L. J. (Q. B.) 737; *Humphreys v. Green*, 10 Q. B. D. 148; 52 L. J. (Q. B.) 140.

(r) *Webber v. Lee*, 9 Q. B. D. 315; 51 L. J. (Q. B.) 174, 485.

(s) *Leroux v. Brown*, 22 L. J. (C. P.) 1; 12 C. B. (74 E. C. L. R.) 801. See *Laycock v. Pickles*, 23 L. J. (Q. B.) 43.

fore it has been held, that, if it actually has been executed, for instance, in the case of a sale of growing crops, by the vendee's reaping them and taking them away, an action will lie to recover the price as for goods sold and delivered (*t*).

A curious point has been decided upon this section [*132] with reference to a parol *demise* of land. *Such a *demise*, if for not more than three years, is good within the Statute of Frauds, the 1st section of which enacts, that "*all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only.*" The 2d section excepts "*all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised*" (*u*).¹ But an *agreement* for such a lease falls, not within the

(*t*) *Parker v. Staniland*, 11 East, 362; *Poulter v. Killingbeck*, 1 B. & P. 397. And see the judgment in *Teal v. Auty*, 2 B. & B. (6 E. C. L. R.) 99.

(*u*) 29 Car. II. c. 3, ss. 1, 2. See 8 & 9 Vict. c. 106, s. 3, *ante*, p. *37.

¹ By the Massachusetts statute, *all* parol leases (without exception as to duration) have the effect of leases at will only: *Ellis v. Paige*, 1 Pick. 43; *Hingham v. Sprague*, 15 Ib. 102; *Hollis v. Pool*, 3 Metc. 551; *Kelly v. Waite*, 12 Ib. 300. So in Maine: *Little v. Pallister*, 3 Me. 15; *Davis v. Thompson*, 13 Ib. 214. By the New York Revised Statutes (2 Rev. St. p. 194), no estate or interest in land other than leases for a term not exceeding one year can be created, unless by operation of law or by writing. In Connecticut (statute of 1838) such leases are invalid, except as against the grantor. The Pennsylvania statute (1772) is, as to this, exactly copied from that of 29 Car. II; omitting, however, the part as to the reservation of rent. This part, however, it will be perceived, was evidently inserted in the English statute as a guard against perjury, in supporting a parol lease for three years or less.—R.

1st, but within the 4th section; for it is an agreement for an interest in lands; and, therefore, though a lease for a year would be perfectly good though made verbally, an agreement [so made] for such a lease cannot be enforced. That was the point decided in *Edge v. Stratford* (x): "It may be said," said *Bayley*, B., delivering the judgment of the Court in that case, "that it is strange that the 2d section of the statute has made a lease for less than three years from the making valid, and *yet that no action shall be maintainable upon it until it is made effectual as a lease by [*133] the entry of the lessee. But, first, the legislature might intend to make a distinction between those cases in which the complaining party was contented to confine himself to its operation as a lease, and sought nothing more than as a lease it would give him, and those in which he went further, and founded upon it a claim for damages, which might far exceed what he could claim under it in the character of a lease; or, secondly, this distinction might not have been contemplated, but may be the result of the true construction of the Statute of Frauds. The first section of that statute provides—that all leases, estates, interests of freehold, or terms of years, or any uncertain interest in lands, made by livery and seisin only, or by parol, and not put in writing, &c., shall have the force and effect of leases or estates at will only; and excepts, nevertheless, all leases not exceeding three years from the making thereof, whereupon the rent reserved shall amount to two-thirds of the full improved value. The 4th section enacts, that no 'action shall be brought whereby to charge the defendant upon any *contract or sale* of lands, or *any interest* in or concerning them, unless the agreement on which such action shall be brought, or some memorandum thereof,

(x) 1 C. & J. 391; 1 Tyr. 293.

be in writing.' Is, then, the agreement on which this action is brought '*a contract of an interest in lands*'?

*Inman v. Stamp (y) says distinctly *it is*: un-
[*134] less that case be successfully impeached, it must govern the present."¹

The last case provided for is that of *any agreement that is not to be performed within the space of one year from the making thereof*. It has been decided, that the *agreements* meant by this section are not *agreements* which may or may not happen to be performed within a year, but agreements which, on the face of them, con-

(y) 1 Stark. (2 E. C. L. R.) 12.

¹ "The effect then," said Bayley, B., in *Edge v. Strafford*, "of the Statute of Frauds, so far as it applies to parol leases, not exceeding three years from the making, is this, that the leases are valid, and that whatever remedy can be had upon them in their character of leases, may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession."

Although the statute enacts that all leases by parol for more than three years shall have the effect of leases at will only, yet it has been held, on both sides of the Atlantic, that occupation and payment of rent under such a lease, will create a tenancy from year to year: *Clayton v. Blakey*, 8 T. R. 3. And although the parol lease for more than three years is void under the statute, as to the *duration* of the term, yet the contract will regulate the terms of the holding in other respects, as, for instance, the amount of rent, &c.: *De Medina v. Polson*, 1 Holt, N. P. R. (3 E. C. L. R.) 47; *Richardson v. Gifford*, 1 A. & E. (28 E. C. L. R.) 52; *Beale v. Sanders*, 5 Scott, 58; *Schuyler v. Leggett*, 2 Cow. 660; *Edwards v. Clemans*, 4 Wend. 480; *Prindle v. Anderson*, 19 Ib. 391; *Hollis v. Pool*, 3 Metc. 350; *M'Dowell v. Simpson*, 3 Watts, 135. But under the statute as expressed in Maine and Massachusetts, as all leases, unless they be written, are leases at will only, it has there been held that a tenancy created by parol, cannot, by occupation and payment of rent, be subsequently enlarged into a tenancy from year to year: *Ellis v. Paige*, 1 Pick. 43; *Hingham v. Sprague*, 15 Ib. 102; *Kelly v. Waite*, 12 Metc. 300; *Little v. Pallister*, 3 Me. 15; *Davis v. Thompson*, 13 Ib. 214.

A recent English statute (8 & 9 Vict. c. 106, § 3) has enacted that every lease required by law to be in writing, of any tenements or hereditaments, made after the 1st of October 1845, shall be void at law unless made by deed; but Mr. Chitty has remarked of this, that it would probably receive the same construction as the section above referred to, as it would seem not unreasonable to hold that the provisions of the statute would be satisfied by restricting its effect to the avoidance of the lease, as a lease simply: Chitty on Contracts, 283, 4th Eng. ed.—s.

template a longer delay than a year before their accomplishment. *Peter v. Compton* (z), the case usually cited as establishing this distinction, affords also a very good illustration of it. It was an action upon an agreement, in which the defendant promised for one guinea to give the plaintiff ten on the day of his marriage. The case was tried before Lord *Holt*, who reserved the question, whether a writing was necessary, for the opinion of all the Judges, a majority of whom were of opinion, "that, where the agreement is to be performed upon a contingency, and it does not appear within the agreement that it is to be performed *after* the year, there a note in writing is not necessary, for the contingency might happen *within* the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note in writing is necessary, otherwise not." There was a difference *of opin- [*135] ion among the Judges in this case, and it is remarkable that Lord *Holt* himself differed from the majority. However, their construction has been frequently adopted since that time.¹

One consequence of this section is, that if a servant be hired for a year, and the service is to begin at a future time, the agreement ought to be in writing, since it will not be performed within a year (a). On the

(z) *Skinner*, 353; 1 *Smith*, L. C., 8th ed. 357.

(a) *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Snelling v. Lord Huntingfield*, 1 Cr. M. & R. 20; *Giraud v. Richmond*, 2 C. B. (52 E. C. L. R.) 835; *Leroux v. Brown*, 22 L. J. (C. P.) 1; 12 C. B. (74 E. C. L. R.) 801; *Britain v. Rossi-*

¹ A parol contract by which a son agreed to work for his father while he lived, to be paid at his death, was held not void as a contract not to be performed within a year: *Updike v. Ten Broeck*, 32 N. J. 105. And see also *Worthy v. Jones*, 11 Gray, 168; *Richardson v. Pierce*, 7 R. I. 330; *Scoggin v. Blackwell*, 36 Ala. 351; *Marcy v. Marcy*, 9 Allen, 8; *Berry v. Doremus*, 30 N. J. 398; *Doyle v. Dixon*, 97 Mass. 208; *Swift v. Swift*, 46 Cal. 266; *Larimer v. Kelly*, 10 Kan. 298; *Riddle v. Backus*, 38 Iowa, 81; *Blair Land Co. v. Walker*, 39 Ib. 406.—s.

other hand where, in consideration that the plaintiff would be and continue his servant as long as they should both please, the defendant promised to leave her, by his last will, an annuity for her life; it was considered that the statute did not apply, it not being expressly and specifically agreed that the agreement should not be performed within the year (*b*). In *Wells v. Horton* (*c*), which was a promise by a testator that his executor should, at his death, pay the plaintiff £10,000, it was held that no writing was required to prove it; and *Best*, C. J., said, the plain meaning of the words of the statute "is confined to contracts which by agreement are not to be carried into execution within a year, and does not extend to such as may by circumstances be postponed *beyond that period; otherwise there is [*136] no contract which might not fall within the statute." *Souch v. Strawbridge* (*d*) was a case in which it was proved that there had been a proposal that the plaintiff should keep an infant child for the defendant for one year, at 5s. a week, which he objected was too much for so young a child; and it was then settled that it should remain with the plaintiff till the defendant gave notice or should think proper. It remained with the plaintiff more than two years. The Court considered no writing to be necessary to prove the agreement; and *Erle*, J., said, the treaty certainly did once contemplate the endurance of the contract for the child's maintenance beyond a year; but the ultimate contract was, that the period should be as long as the defendant should think proper.

ter, 48 L. J. (Q. B.) 362; 11 Q. B. D. 123. See *Cawthorn v. Cordrey*, 13 C. B. (N. S.) (106 E. C. L. R.) 406; 32 L. J. (C. P.) 152.

(*b*) *Fenton v. Emblers*, 3 Burr. 1278.

(*c*) 4 Bing. (13 E. C. L. R.) 40.

(*d*) 2 C. B. (52 E. C. L. R.) 808; 15 L. J. (C. P.) 170. This decision was followed in the similar case of *Knowlman v. Bluett*, L. R. 9 Ex. 1, 307 (Ex. Ch.); 43 L. J. (Ex.) 29, 151 (Ex. Ch.).

Thus, also, it is held that, where it appears not to have been the intent of the parties that the agreement should extend beyond a year, although it might extend far beyond that time, it need not be in writing; but where it appears to be the intent of the parties that the agreement shall not be performed within one year from the making, it must be in writing, although determinable upon a contingency within a year. Therefore, where by the terms of the contract it is to last for a longer *period than a year, a custom by which it might be put an end to by one of the parties within [*137] that period does not take it out of the operation of the statute (e). In like manner an undertaking to pay an annuity for life must be in writing, although it may terminate by death within a year (f). And so a contract for service for more than a year, but subject to determination within the year on a given event, is within the 4th section. The circumstance that it is defeasible will not make it other than a contract for more than a year. If it were not so, contracts for any number of years might be made by parol, provided they contained a defeasance which might come into operation before the end of the first year (g). So an agreement on the defendant's part not to set up the trade of a tailor within five miles of D. during the joint lives of himself and the plaintiff is *primâ facie* not to be performed within a year, and therefore within this section of the statute (h).

Where, however, all that is to be done by one party, as the consideration for what is to be done by the other, actually is done within the year, the statute does not

(e) *Birch v. Earl of Liverpool*, 9 B. & C. (17 E. C. L. R.) 392.

(f) *Sweet v. Lee*, 3 M. & G. (40 E. C. L. R.) 452.

(g) *Dobson v. Collis*, 1 H. & N. 81; 25 L. J. (Ex.) 267.

(h) *Davey v. Shannon*, 4 Ex. Div. 81; 48 L. J. (Q. B., etc.) 459.

prevent that party suing the other for the non-performance of his part of the *contract. Where the [*138] one has the full benefit of the contract, the law will not permit the other to withhold the consideration. As, where a landlord had agreed to lay out £50 on improvements on the premises demised, and the tenant, in consequence, had undertaken to pay £5 a year additional rent for the remainder of his term, of which there were several years, and the landlord laid out the £50 within the year, he was allowed to recover the additional rent, although the agreement was not in writing (i);¹

(i) *Donellan v. Reed*, 3 B. & Ad. (23 E. C. L. R.) 899; *Souch v. Strawbridge*, 2 C. B. (52 E. C. L. R.) 808; *Cherry v. Heming*, 4 Ex. 631. See *Nunn v. Fabian*, L. R. 1 Ch. 35; 35 L. J (Ch.) 140.

¹ It has been held in England that the words in the statute "not to be performed," mean not to be performed *on either side*, that is, that an agreement does not come within the statute provided all that is to be done *by one of the parties* is to be done within a year: *Donellan v. Reed*, 3 B. & Ad. (23 E. C. L. R.) 899. There the defendant, who was the plaintiff's tenant under a lease of 20 years, promised, in consideration that the latter would lay out £50 in alterations, to pay an additional £5 annually, during the remainder of the term. The alterations were finished within the year, and to an action for the additional £5, the defendant pleaded that the contract could not possibly be performed within a year, and therefore ought to have been written. But the Court held that as the contract was entirely executed on one side within the year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds did not apply. Mr. Smith has questioned the propriety of this decision as being opposed to *Peter v. Compton*, both in his notes to that case, in the *Leading Cases* (vol i. p. 614, 8th Am. ed.), and in his "*Mercantile Law*" (p. 440), but in the very recent case of *Cherry v. Heming*, 4 Exch. 631, the facts and the decisions were much the same as in *Donellan v. Reed*, and the Court, referring to the remarks of Mr. Smith, were of opinion that they were not sufficient to induce them to doubt the authority of that case. On this side of the Atlantic the construction thus adopted has been followed in some cases: *Holbrook v. Armstrong*, 10 Me. 31; *Rake v. Pope*, 7 Ala. 161; *Johnson v. Watson*, 1 Ga. 348; but rejected in others: *Broadwell v. Getman*, 2 Den. 87; *Cabot v. Haskins*, 3 Pick. 83; *Lockwood v. Barnes*, 3 Hill, 128. The practical difference between these classes of cases may be thus explained. "It often happens," as was said in *Donellan v. Reed*, "in cases of parol sale of goods, that they are not to be paid for in full till after the expiration of a longer time than a year, and surely the law would not sanction a defence on that ground, where the buyer had had the full benefit of the goods on his part." Under such circumstances, however,

for this enactment applies only to contracts not *to be* performed on either side within the year. Therefore,

it cannot be doubted that although by the operation of the statute, the seller might fail to recover the price of the goods *by the terms of the contract*, he could not fail to recover upon a *quantum valebant*: *Poulter v. Killingbeck*, 1 B. & P. 397; *Earl of Falmouth v. Thomas*, 1 Cr. & M. 109; *Teal v. Auty*, 2 B. & B. (6 E. C. L. R.) 99; *Philbrook v. Belknap*, 6 Vt. 383; and the difference would therefore be, that under *Donellan v. Reed*, the plaintiff could recover merely upon proving the contract and its performance on his part, while under the opposite authorities, the benefit to the defendant must be shown.

The point decided in *Souch v. Strawbridge*, *supra*, viz., that the statute only applies where, from the terms of the agreement, the contract must necessarily extend beyond one year, was, long before that decision, held the same way in *Moore v. Fox*, 10 Johns. 244, where a promise was made by one of a congregation to pay the plaintiff, its pastor, two dollars a year for his services as such, and he sued for services rendered many years after, and it was held that the plaintiff having received his salary semi-annually, it must be presumed that such was the understanding at the time of the agreement, and hence the contract was not within the statute, because the plaintiff could have withdrawn at any time within the year, and yet recovered his services for the first six months. So in *Artcher v. Zeh*, 5 Hill, 200; and it seems also, that whenever the time of the duration of the contract is to depend on the contingency of life, the contract need not be written: *Wells v. Horton*, 4 Bing. (13 E. C. L. R.) 40; *Thompson v. Gordon*, 3 Strob. 197; *Bull v. McCrea*, 8 B. Mon. 422; as, for instance, a promise not to carry on the business of a livery-stable keeper, because the death of the contracting party might happen within the year: *Lyon v. King*, 11 Metc. 411; a promise to be performed on the death of the promisor: *Wells v. Horton*, 4 Bing. (13 E. C. L. R.) 40; *Thompson v. Gordon*, 3 Strob. 197, &c.; because the death of the promising party might occur instantaneously. The student will find these and many other cases classified in the American note to *Peter v. Compton*, 1 Smith's L. C. 614, 8th Am. ed.—R.

If by its terms or by reasonable construction, a contract not in writing can be fully performed within a year, although it can be done only by the occurrence of some improbable event, as the death of a person referred to, it is not within the statute. So if it can be performed on one side within a year: *Blanding v. Sargent*, 33 N. H. 239; *Wiggins v. Keizer*, 6 Ind. 252; *Soggins v. Heard*, 31 Miss. 426; *Suggett v. Cason*, 26 Mo. 221; *Burney v. Ball*, 24 Ga. 505; *Sherman v. Champlain Co.*, 31 Vt. 162; *Wilson v. Ray*, 13 Ind. 1; *Dresser v. Dresser*, 35 Barb. 573; *Hill v. Jamieson*, 16 Ind. 125. Payment or performance of the consideration of an agreement, not to be performed within the year, never takes it out of the statute: *Pierce v. Paine*, 28 Vt. 34; see *Boutwell v. O'Keefe*, 32 Barb. 434. An agreement to employ a person for the term of one year, to commence *in futuro*, is void: *Amburger v. Marvin*, 4 E. D. Sm. 393; *Kelly v. Terrel*, 26 Ga. 551. An agreement by an infant to work seven years for his board is not within the statute: *Wilhelm v. Hardman*, 13 Md. 140. A parol agreement not to carry on a trade in the village of B., is not within the statute, as it may be wholly performed within one year by the death

in a case where the defendant, in a letter signed by him, proposed to the plaintiff that she should assign to the defendant, in trust for an institution managed by him, a patent which she had obtained for making toys, such patent to be used by the institution, the plaintiff to have 5 per cent. on the profits, and the defendant to provide for the next payment in respect of the patent; and if the payments made should not equal a certain sum in the first and subsequent years, the plaintiff to have the right to reclaim the patent, and this proposal was accepted by the plaintiff by word of mouth; it was held that the contract did not require to be in writing under [*139] the 4th section of the Statute of Frauds *inasmuch as all that was to be done by the plaintiff as the consideration of defendant's promise was capable of being done within a year, and it did not appear that any part of it was to be postponed until after a year (*k*).

Where a servant has entered on his duties under a verbal contract for yearly service, coming within the 4th section, and is dismissed within the year for no fault of his own, he can, it seems, recover the value of the services rendered by him up to the time of his dismissal (*l*).

I have now gone through the five cases to which the 4th section of the Statute of Frauds applies, and in which it requires a written memorandum of the contract. There are one or two cases of very considerable importance in practice on which I shall briefly observe

(*k*) *Smith v. Neale*, 26 L. J. (C. P.) 143; 2 C. B. (N. S.) (89 E. C. L. R.) 67.

(*l*) See *Snelling v. Lord Huntingfield*, 1 Cr. M. & R. 20; and the remarks of *Thesiger*, L. J., in *Britain v. Rossiter*, 48 L. J. (Q. B.) 362, 367; 11 Q. B. D. 123, 133.

of either party: *Richardson v. Pierce*, 7 R. I. 330; *Worthy v. Jones*, 11 Gray, 168.—s.

in the next Lecture, in which a writing is required by the express enactment of the legislature. Having mentioned them, I shall say something of the *consideration* upon which a simple contract may be grounded, and which is, as you are aware, an essential part of every such contract; and then, having finished the remarks I had to make on Simple Contracts exclusively, shall resume the *consideration of the general law of contracts, and shall speak of the *competency* or [*140] *incompetency* of the contracting parties, and of *remedies* by which, in case of breach of contract, their performance is to be enforced.

SALE OF GOODS, ETC., UNDER THE 17TH SECTION OF THE
 STATUTE OF FRAUDS.—OTHER CONTRACTS WHERE
 WRITING IS OR HAS BEEN NECESSARY.—POINTS AP-
 PLYING TO ALL SIMPLE CONTRACTS.—ASSENT.—
 OFFER AND ACCEPTANCE.—CONSIDERATION OF CON-
 TRACTS BY DEED AND OF SIMPLE CONTRACTS.

I CONCLUDED in the last Lecture the consideration of the five cases in which the 4th section of the Statute of Frauds renders it necessary that a contract should be reduced into writing. There are, as I then said, a few other cases, which, being of constant occurrence, it will be right to specify before proceeding to the next branch of the subject.

The first of these cases is that of a sale for the price of £10 or upwards, regarding which the 17th section of the Statute of Frauds has provided as follows:—

“No contract for the sale of any goods, wares, or merchandises for the price of £10 or upwards shall be good, except the buyer shall accept part of the goods so
 [*142] sold, and actually receive the *same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

As to the subject-matter of this section there is little difficulty in applying it. As to the case of growing crops, and trees, and roots, &c., in the ground, the law

has been already considered in treating on the 4th section. It has been decided that shares in railway and other joint stock companies are not an interest in land within the 4th section of the Statute of Frauds; nor are they goods, wares, or merchandises, within the 17th (a). A sale, also, of tenant's fixtures is not a sale of goods within this section, and as we have already seen (*ante*, p. *127), is not within the 4th (b).

The first great difference which you will observe between this section and the 4th section of the same Act is, that the 4th section renders a writing necessary in *all cases* which fall within its terms; whereas the 17th mentions three circumstances, any one of which it directs shall be as effectual as *a writing, namely, *acceptance of any part of the goods, payment of part* [*143] *of the price*, and, lastly, the *giving something by way of earnest* to bind the bargain, or in part payment; any one of which three things will as effectually perfect the sale as a writing would (c). Where none of these has taken place, a writing, however, becomes necessary;¹ and

(a) *Humble v. Mitchell*, 11 A. & E. (39 E. C. L. R.) 205; *Bradley v. Holdsworth*, 3 M. & W. 422; *Bowlby v. Bell*, 3 C. B. (54 E. C. L. R.) 284; *Knight v. Barber*, 16 M. & W. 66; *Tempest v. Kilner*, 3 C. B. (54 E. C. L. R.) 249. See *Baxter v. Brown*, 7 M. & G. (49 E. C. L. R.) 198.

(b) *Lee v. Gaskell*, 1 Q. B. D. 700; 45 L. J. (Q. B. etc.) 540.

(c) As to what amounts to acceptance and receipt within the meaning of this section, generally, see *Blackburn on Sales*, 22, 23; *Benjamin on Sales*, Book I, part ii. chap. iv. As to what is a sufficient acceptance and receipt of bulky things such as growing timber, see *Marshall v. Green*, 1 C. P. D. 35; 45 L. J. (Q. B. etc.) 153.

¹ Delivery to and acceptance by the agent of the vendee is sufficient: *Outwater v. Dodge*, 6 Wend. 397. *Aliter* of an acceptance by a mere shopboy, out of the scope of his duty: *Smith v. Mason, Anthon*, 225. Goods are received and accepted by the purchaser within the Statute of Frauds when they are transported by the seller to the place of delivery appointed by the agent who contracted for them, and are there delivered to another agent of the purchaser, and are by him shipped to a port where the purchaser had given him general directions to ship goods of the same kind: *Snow v. Warner*, 10 Metc. 132. A delivery of goods by the vendor, on a parol sale, whether actual or constructive, and an acceptance by the vendee, is a per-

if there be none, the bargain cannot be enforced by action. It was formerly indeed thought that the opera-

formance of the contract, and the vendor cannot afterwards retract and avoid the sale as being within the Statute of Frauds: *Johnson v. Watson*, 1 Ga. 348. To constitute a delivery and acceptance of goods sold, within the meaning of the statute, something more than mere words is necessary. There must be some act of the parties, amounting to a transfer of the possession, and an acceptance thereof by the buyer, and the case of cumbrous articles is not an exception to this rule: *Shindler v. Houston*, 1 N. Y. 261. Where, by the terms of an agreement for the sale and purchase of goods, cash is to be paid on the delivery of the goods, payment of the money is sufficient evidence that the goods have been delivered in pursuance of the contract, for the purpose of taking the case out of the Statute of Frauds: *Aguirre v. Allen*, 10 Barb. 74. See also upon the subject of acceptance of part, *Vincent v. Germond*, 11 Johns. 283; *Seymour v. Davis*, 2 Sand. 239.

A contract to make machines for a specified price and find the materials, is not within the statute: *Spencer v. Cone*, 1 Metc. 283. If the articles exist at the time in the condition in which they are to be delivered, it should be regarded as a contract of sale; but if labour and skill are to be applied to existing materials, it is then a contract for the manufacture of such article: *Hight v. Ripley*, 19 Me. 137; *Cummings v. Dennett*, 26 Me. 397; *Cason v. Cheely*, 6 Ga. 554; *Seymour v. Davis*, 2 Sand. 239; *Allen v. Jarvis*, 20 Conn. 38; *Bronson v. Wiman*, 10 Barb. 406; *Hardell v. McClure*, 1 Wis. 271. A delivery takes the case out of the statute: *Houghtaling v. Ball*, 19 Mo. 84. It may be subsequent to the agreement: *Marsh v. Hyde*, 3 Gray, 331; *Sale v. Darrah*, 2 Hilt. 184. A parol sale, unaccompanied by an act of the vendee indicating acceptance of the goods is void: *Alderton v. Buchoz*, 3 Mich. 322; *Shepherd v. Pressey*, 32 N. H. 49; *Gilman v. Hill*, 36 Ib. 311. Partial delivery by vendor is a part performance which takes the case out of the statute: *Dennison v. Carnahan*, 1 E. D. Sm. 144; *Swigart v. McGee*, 19 Ark. 473. A parol contract for goods on shipboard, without delivery, is void: *Stevens v. Stewart*, 3 Cal. 140. Growing crops are not goods and chattels within the meaning of this provision: *Bours v. Webster*, 6 Ib. 660. A provision for the transportation of cattle to the place of delivery, although effected according to the verbal agreement, does not take it out of the statute: *Barbour v. Disher*, 11 Rich. 347. When goods are purchased under a parol contract, without the payment of any earnest money, the delivery of them to a carrier, selected and named by the purchaser, and their acceptance by the carrier, constitute a sufficient acceptance: *Spencer v. Hale*, 30 Vt. 314. The mere taking a sample without an express understanding that such taking is to be a delivery is not enough: *Carver v. Lane*, 4 E. D. Sm. 168. There is no acceptance although the goods may have been delivered to a carrier, so long as the buyer has the right to object to the quantity or quality: *Lloyd v. Wright*, 25 Ga. 215. A verbal agreement to purchase goods and credit the price towards payment of an old debt is valid the moment the act of giving the credit is performed by the buyer making the entry in his books: *Brabin v. Hyde*, 30 Barb. 265. A promise to pay to the vendor's creditor, accepted by him, who thereupon dis-

tion of the 17th section was to make the bargain void altogether in the absence of one of the three essential circumstances above-mentioned. Thus in *Laythoarp v. Bryant* (*d*), *Bosanquet*, J., says: "the 4th section does not avoid contracts not signed in the manner described; it only precludes the right of action. This 17th section is stronger, and *avoids* contracts not made in the manner prescribed." This proposition, however, hardly represents the present state of the law, and since the case of *Bailey v. Sweeting* (*e*), it is not safe to say that a parol sale, unaided by any of the three formalities mentioned in the 17th section as equivalent to writing, is totally and *entirely void. In that case, a letter from [*144] the purchaser to the seller of goods, written *after* the contract was made, and the goods had been sent, was held a sufficient memorandum to satisfy the 17th section; and *Williams*, J., in giving judgment, said: "It cannot be controverted that, in point of fact, there was a good and lawful contract for the sale of the goods, the price of which is sought to be recovered. It is clear, however, that as the price is greater than £10, the contract, though good, would not be actionable, unless the requisites of the Statute of Frauds had been complied with." (His Lordship here read the 17th sect.) "The effect of that section is, that though there is a valid verbal contract, it is not actionable unless something of several things has happened, one of which is, the existence of a note or memorandum in writing

(*d*) 2 Bing. N. C. (29 E. C. L. R.) 735.

(*e*) 9 C. B. N. S. (99 E. C. L. R.) 843, 30 L. J. (C. P.) 150, 154.

charges the vendor, is a sufficient part payment: *Cotterill v. Stevens*, 10 Wis. 422. A delivery and acceptance of goods, sufficient to satisfy the Statute of Frauds, can only be shown by some clear and unequivocal act: *Denny v. Williams*, 5 Allen, 1. A part payment will not take a contract out of the statute unless made at the time of the contract: *Bissell v. Balcom*, 40 Barb. 98.—s.

of the bargain signed by the party to be charged. As soon as that occurs, the contract, though not previously actionable, becomes actionable." In the recent case also of *Maddison v. Alderson* (*f*), Lord *Blackburn* says: "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract."

[*145] *A doubt was entertained at one period whether the 17th section included the case of a contract for something not in existence in a chattel state at the time of making the bargain, but which was to become a chattel before the time agreed upon for its delivery (*g*). Where, for instance, growing timber was bargained for, to be delivered cut into planks, or a ship or a carriage not yet built.¹ However, any doubt that

(*f*) 8 App. Cas. 467, 488; 52 L. J. (Q. B.) 737, 749.

(*g*) *Lee v. Griffin*, 30 L. J. (Q. B.) 252.

¹ It was formerly held that *executory* contracts were not within the statute, but that it was confined to cases where the buyer was immediately answerable: *Towers v. Osborne*, Str. 506; *Clayton v. Andrews*, 4 Burr. 2101; but this distinction was doubted by Lord Thurlow, in 3 Bro. C. C. 355, and was subsequently overruled: *Rondeau v. Wyatt*, 2 H. Bl. 63; *Cooper v. Elston*, 7 T. R. 14.

The statute of 9 Geo. IV. has not been generally re-enacted in this country, and hence the English cases upon the construction of this part of the Statute of Frauds before its alteration have still a practical application here. The first case was *Towers v. Osborne*, already cited, where the defendant bespoke a chariot, and refused to take it when made, and the Court held that a writing was not necessary, for the statute "related only to contracts for the actual sale of goods, when the buyer is immediately answerable, without time given him by special agreement." Then came *Clayton v. Andrews*, *supra*, where the plaintiff agreed to deliver a load and a half of wheat within a month, at so much a load, to be paid on delivery, the wheat being then unthrashed, and the Court, on the authority of *Towers v. Osborne*, held the case not to be within the statute, rather, however, on the ground of the contract being *executory*, than because the wheat did not then exist in the form in which it was to be delivered. Then these two cases were, as has been said, overruled as to the dis-

formerly existed on this subject is now put an end to; for, by statute 9 Geo. 4, c. 14, s. 7, it is enacted that the

distinction between executed and executory contracts. Then in *Garbutt v. Watson*, 5 B. & Ald. (7 E. C. L. R.) 613, the contract was for the delivery of flour, which was then unground wheat, and the Court said that "in *Towers v. Osborne*, the chariot which was ordered to be made would never, but for that order, have had any existence. But here the plaintiffs were proceeding to grind the flour for the purposes of general sale, and sold this quantity to the defendant as part of their general stock. The distinction is indeed somewhat nice, but the case of *Towers v. Osborne* is an extreme case, and ought not to be carried further," and it was said that the question was whether the contract was for the sale of goods, or for work and labour and material found; and the case of *Clayton v. Andrews*, which was scarcely distinguishable from the present one on this point, was said to have been also incorrectly decided upon the point of the condition of the wheat. Subsequent cases have held that contracts to sell oil not then expressed from seeds: *Wilks v. Atkinson*, 6 Taunt. (1 E. C. L. R.) 11; to supply a house with pipes to be laid in a specified manner: *West Middlesex Co. v. Suwerkrop*, 4 C. & P. 87; to make a copper-plate press to be ready in three months: *Pinner v. Arnold*, 2 Cr. M. & R. 613, overruling *Buxton v. Beddall*, 3 East, 304, and the like, are within the statute, and must, therefore, be written; but a contract to deliver a quantity of oak pins, which were not then made, but were to be cut out of slabs, being merely an agreement for labour to be done upon materials found, was held not to be a "contract for the sale of goods," for the thing to be delivered did not exist *in solido*, and would be incapable of delivery: *Groves v. Buck*, 3 M. & S. 178. In this country, the distinction between the contract being executed and executory has also been disregarded: *Bennett v. Hull*, 10 Johns. 364; *Crookshank v. Burrell*, 18 Ib. 58; *Jackson v. Covert*, 5 Wend. 141; *Cason v. Cheely*, 6 Ga. 554. As respects the condition of the subject of the contract, it has been truly said that "the difficulty arises not so much from any uncertainty in the rule, as from the infinitely various shades of different contracts. If it is a contract to sell and deliver goods, whether they are then completed or not, it is within the statute. But if it is a contract to make and deliver an article or a quantity of goods, it is not within the statute:" per Shaw, C. J., in *Gardner v. Joy*, 9 Metc. 179; and the same judge subsequently thus laid down the rule: "when a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale, and not a contract for labour; otherwise, when the article is made pursuant to an agreement:" *Lamb v. Crofts*, 12 Ib. 356; *Cason v. Cheely*, 6 Ga. 554. Thus, agreements to make the woodwork of a wagon, to be paid for in lambs at one dollar a head: *Crookshank v. Burrell*, 18 Johns. 58; to completely line with cloth, selected by defendant, a buggy of which the body existed in an unfinished state: *Mixer v. Howarth*, 21 Pick. 204; and to make ten stave machines, and find the materials: *Spencer v. Cone*, 1 Metc. 283; to make twelve surgical adjusters, and find the materials: *Allen v. Jarvis*, 20 Conn. 38; to furnish, as soon as practicable, one thousand or twelve hundred malleable hoe shanks, agreeably to patterns furnished: *Hight v. Ripley*, 19 Me. 137; were respect-

17th section of the Statute of Frauds "shall extend to all contracts for the sale of goods of the value of £10 sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, pro-

ively held not to be contracts within the statute: see *Cummings v. Dennett*, 26 Ib. 397; but a contract for the purchase of one hundred boxes of candles, the time of delivering not being mentioned, but the defendant stating that they were not yet manufactured, but he would manufacture and deliver them in the course of the summer, was in a late case held to be a "sale of goods" within the statute: *Gardner v. Joy*, 9 Metc. 179; so of cider not yet manufactured: *Seymour v. Davis*, 2 Sandf. 241; wheat not yet thrashed: *Downs v. Ross*, 23 Wend. 274; and cotton to be packed in bales: *Cason v. Cheely*, 6 Ga. 554. In Maryland, in 1821, the case of *Eichelberger v. M'Cauley*, 5 Harr. & J. 214, was for the delivery of unthrashed wheat, and on the authority of *Clayton v. Andrews*, the contract was held not to be within the statute, but the late authorities seem generally to agree in condemning the decision of that case, and say, moreover, of *Towers v. Osborne*, that it was rightly decided, but upon a wrong reason.

It has been held in England that contracts for the sale of shares in a joint-stock, banking company, or in a railway company, or of foreign stock, need not be in writing, as not coming within the term "goods, wares, or merchandise:" *Humble v. Mitchell*, 11 A. & E. (39 E. C. L. R.) 205; *Bowbly v. Bell*, 3 C. B. (54 E. C. L. R.) 284; *Tempest v. Kilner*, Ib. 249; *Duncuft v. Albrecht*, 12 Sim. 189; *Heseltine v. Siggers*, 1 Exch. 867; but in *Colvin v. Williams*, 3 Harr. & J. 38, and *Tisdale v. Harris*, 20 Pick. 9, the statute was differently construed (in *Gadsden v. Lance*, 1 McMul. Eq. 87, this point was left undecided), and in *Baldwin v. Williams*, 3 Metc. 365, the authority of *Tisdale v. Harris* was confirmed, and the statute held to apply also to sales of promissory notes.—R.

An agreement to procure and deliver at a certain time and place one-half of a frame for a vessel to be hewn and fashioned according to certain mould, is not within the statute: *Abbott v. Gilchrist*, 38 Me. 260. A contract for delivery at a future day of goods yet to be manufactured is not a contract for sale, but for work and labour only: *Donovan v. Willson*, 26 Barb. 138; *Parker v. Schenck*, 23 Ib. 38; see *Woodford v. Patterson*, 32 Ib. 630; *Mead v. Case*, 33 Ib. 202; *Phipps v. McFarlane*, 3 Minn. 101; *Atwater v. Hough*, 29 Conn. 508; a contract for the manufacture of an article out of material to be supplied by the manufacturer is not within the statute: *Crockett v. Scribner*, 64 Me. 447; a contract for the sale of corn if by its terms the corn is to be gathered and shocked before delivery, is not within the statute: *Rentch v. Long*, 27 Md. 188; *Webster v. Zielly*, 52 Barb. 482; and see *Ross v. Welch*, 11 Gray, 235; *Bissell v. Falcom*, 40 Barb. 98; *Wylie v. Kelly*, 41 Ib. 594; *Malone v. Plato*, 22 Cal. 103; *Brabin v. Hyde*, 32 N. Y. 519; *Lay v. Neville*, 25 Cal. 545; *Hill v. McDonald*, 17 Wis. 97; *Dow v. Worthen*, 37 Vt. 108.—S.

cured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." These two statutes, according to a well-known rule, are to be read as incorporated together (*h*), one effect of which is that the 17th section of the Statute of Frauds must be read as applying to all goods, &c., of the *value* of £10, instead of the *price* to that amount (*i*):

*Where a writing is relied on to satisfy the provisions of the 17th section, the rules which [*146] govern the case are very analogous to those which I have already stated with regard to the 4th. The signature must be by the party to be *charged*, or his agent. And one party cannot be the other's agent for this purpose (*k*). Nor where the agent of the party complaining of a breach of the contract has signed with his own name a memorandum of the bargain at the request of the party to be charged, is he to be considered as the agent of the latter in the absence of other circumstances showing authority to the signer to act as the agent of the party to be charged (*l*). But under neither the 4th nor the 17th section is there any necessity for the agent's being appointed by writing. The question who is an agent lawfully authorised within the meaning of the Statute of Frauds will be considered more fully hereafter when we come to the law of agency (*m*).

(*h*) *Scott v. Eastern Counties Railway Co.*, 12 M. & W. 33; *Harman v. Reeve*, 25 L. J. (C. P.) 257; 18 C. B. (86 E. C. L. R.) 587.

(*i*) *Harman v. Reeve*, *supra*.

(*k*) *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 B. & Ald. (7 E. C. L. R.) 333; *Sharman v. Brandt*, L. R. 6 Q. B. 720; 40 L. J. (Q. B.) 312.

(*l*) *Graham v. Musson*, 5 Bing. N. C. (35 E. C. L. R.) 603; *Graham v. Fretwell*, 3 M. & G. (42 E. C. L. R.) 368. See *Bird v. Boulter*, 4 B. & Ad. (24 E. C. L. R.) 443, *post*; and *Mews v. Carr*, 26 L. J. (Ex.) 39; 1 H. & N. 484; *Durrell v. Evans*, 30 L. J. (Ex.) 254.

(*m*) See *post*, Lect. ix., "Agent under Statute of Frauds."

Under the 17th section, too, as well as under the 4th, several documents may be read together as [*147] *making up the contract, provided they be sufficiently connected in sense among themselves without the aid of parol evidence (*n*). And in such cases, as different phrases are commonly used in the different documents, it is peculiarly important to ascertain that both parties mean the same thing; as where there was a treaty for the sale of a horse, and one wrote that he would buy him if warranted sound and quiet in harness, and the other wrote that he would warrant him sound and quiet in *double*-harness, it was considered by the Court that the parties never had contracted in writing *ad idem*, and, consequently, that the statute had not been complied with (*o*).

It need hardly be added that although it appears that there are several memoranda of the contract, it will not be presumed that they differ; but on the contrary, if any one of them contain enough to show the contract, it is a sufficient memorandum within the statute. Therefore, in an action by the vendor against the purchaser of goods, a note signed by a broker acting for both parties, expressing that the broker had "sold" specified goods at a specified rate, and containing all the terms of [*148] the *contract (which, from containing the word "sold," is called in commerce the sold note, and should, in fact, correspond with another also signed by the broker and called the bought note), was sufficient to satisfy the statute. "If in ordinary practice," said *Willes, J.*, "the bought and sold notes were different

(*n*) *Smith v. Surman*, 9 B. & C. (17 E. C. L. R.) 561; *Archer v. Baynes*, 5 Ex. 625; *Phillimore v. Barry*, 1 Camp. 513; *Jackson v. Lowe*, 1 Bing. (8 E. C. L. R.) 9; *Pierce v. Corf*, L. R. 9 Q. B. 210.

(*o*) *Jordan v. Norton*, 4 M. & W. 155; *Hutchison v. Bowker*, 5 M. & W. 535. See *Sievewright v. Archibald*, 17 Q. B. (79 E. C. L. R.) 103; 20 L. J. (Q. B.) 529.

things, there might be some ground for the defendant's argument, but it is well known that in ordinary practice they are identical—the one being a copy of the other; and, therefore, it would be a violent presumption to assume in favour of the defendant that the bought note was a different one from the sold note. The sold note is to be presumed, until the contrary is shown, to represent the contract between the parties" (*p*). And where a broker who has authority to act for both parties enters in his broker's book both the bought and sold note, and signs them both, this is a sufficient memorandum of the bargain to satisfy this section (*q*).

It was said by Lord *Ellenborough* in *Egerton v. Matthews* (*r*), that the word *bargain*, used in this section, does not render so strict a statement of the transaction necessary, as the word *agreement*, used in the 4th, does of matters within that section. It has, however, been decided that the names of both *parties* must appear in the memorandum, though the signature of the party *to be bound* alone is *requisite; for, as the Court [*149] observed, there cannot be a *bargain* without two parties, and therefore a memorandum naming one only is not a memorandum of a bargain (*s*). But it seems to be quite enough if the parties are sufficiently described (*t*). And the price ought to be stated if one was agreed on, for that is part of the bargain (*u*). A

(*p*) *Parton v. Crofts*, 33 L. J. (C. P.) 189.

(*q*) *Thompson v. Gardiner*, 1 C. P. D. 777; and see *ante*, pp. *93, *94.

(*r*) 6 East, 307.

(*s*) *Champion v. Plummer*, 1 B. & P. (N. R.) 252; *Williams v. Lake*, 2 E. & E. (105 E. C. L. R.) 349; 29 L. J. (Q. B.) 1; *Vandenbergh v. Spooner*, L. R. 1 Ex. 316; 35 L. J. (Ex.) 201; see *Newell v. Radford*, L. R. 3 C. P. 52; 37 L. J. (C. P.) 1.

(*t*) See *ante*, pp. *82–*85, and the cases there cited with reference to the 4th section. There seems no distinction in this respect, in point of principle, between the 17th and 4th sections.

(*u*) *Elmore v. Kingscote*, 5 B. & C. (11 E. C. L. R.) 583; *Hoadley v. M'Laine*, 10 Bing. (25 E. C. L. R.) 482.

memorandum is not sufficient that does not mention price, if an agreement has been come to on that point. Thus, when the seller showed the buyer a list of prices, and the buyer only agreed to purchase on condition of a deduction of 25 per cent. from such prices for cash payment, and then wrote an order for certain of the articles, not specifying anything as to price; this was held not enough to satisfy the statute, and a subsequent letter from him declining to take the goods, was deemed also insufficient to take the case out of the statute (*x*). If no price be named, the parties must be understood to [*150] have agreed for what the thing is *reasonably worth (*y*). Thus, an order for goods "on moderate terms" is a sufficient memorandum within the 17th section of the Statute of Frauds (*z*). A contract for the sale of goods of the value of £10 is within the 17th section, although it includes other matters for which a writing is not necessary (*a*). And if the memorandum contains all that was to be done by the party sought to be charged, it has been held sufficient to satisfy the 17th section, though not to make a valid agreement in cases within the 4th section (*b*). But it is important to be borne in mind that in construing these memoranda the surrounding circumstances may be considered, which often make that quite plain which would be obscure without them (*c*).

It is now decided, that a memorandum is sufficient which contains all the terms of the bargain, and acknowledges it to have been made, but at the same time

(*x*) *Goodman v. Griffiths*, 26 L. J. (Ex.) 145; 1 H. & N. 574.

(*y*) *Valpy v. Gibson*, 4 C. B. (56 E. C. L. R.) 837.

(*z*) *Ashcroft v. Morrin*, 4 M. & Gr. (43 E. C. L. R.) 450.

(*a*) *Harman v. Reeves*, 25 L. J. (C. P.) 257; 18 C. B. (86 E. C. L. R.) 587; *Watts v. Friend*, 10 B. & C. (21 E. C. L. R.) 446.

(*b*) *Sarl v. Bourdillon*, 26 L. J. (C. P.) 78; 1 C. B. (N. S.) (87 E. C. L. R.) 188; *Egerton v. Matthews*, 6 East, 307.

(*c*) *Newell v. Radford*, L. R. 3 C. P. 52; 37 L. J. (C. P.) 1.

repudiates the contract. Thus, where the purchaser of goods wrote to the seller, referring to all the material terms of the contract, but stating that he had never received the goods, and declined to do so because they had been damaged by the carrier before they reached him; the Court *considered that the former part of the letter contained a memorandum of the con- [*151] tract, which was all that was required by the statute; and that the existence in the same writing of the refusal to abide by the bargain did not neutralize the acknowledgment (*d*). But although the statute invalidates all contracts for the sale of goods unless in writing, or unless the buyer accept the goods, or give earnest, or pay in whole or part, and therefore virtually, and in effect forbids their being in any way varied or altered by parol (*e*); yet it does not forbid their being rescinded by parol; and there is no doubt that they may be so rescinded (*f*).

Another case, formerly of considerable importance, in which the legislature required that a particular contract should be in writing, was that of *an infant*. There are many contracts which, when entered into by an infant under the age of twenty-one years, are invalid, as I shall have occasion to explain to you at greater length when I arrive at that part of the subject which relates to *the *competency* of parties to contracts, but which, before recent legislation, were capable of [*152] being ratified by the infant when he arrived at his full

(*d*) *Bailey v. Sweeting*, 9 C. B. (N. S.) (99 E. C. L. R.) 843; 30 L. J. (C. P.) 150; *Wilkinson v. Evans*, L. R. 1 C. P. 407; 35 L. J. (C. P.) 224; *Buxton v. Rust*, L. R. 7 Ex. 1, 279 (Ex. Ch.); 41 L. J. Ex. 1, 173. And compare *Cooper v. Smith*, 15 East, 103.

(*e*) *Harvey v. Grabham*, 5 A. & E. (31 E. C. L. R.) 61; *Marshall v. Lynn*, 6 M. & W. 109; *Stead v. Dawber*, 10 A. & E. (37 E. C. L. R.) 57; *Moore v. Campbell*, 23 L. J. (Ex.) 310; *Noble v. Ward*, 35 L. J. (Ex.) 81; 36 L. J. (Ex.) 91, in Ex. Ch.; S. C., L. R. 1 Ex. 117; *Ib.*, 2 Ex. 135.

(*f*) *Ib.* See *Goss v. Lord Nugent*, 5 B. & Ad. (27 E. C. L. R.) 58.

age of twenty-one. This ratification might, at common law, have been by parol; but, it was enacted by 9 Geo. IV. c. 14, s. 5, that no action should be maintained whereby to charge any person upon any promise made *after full age* to pay any debt contracted *during infancy*, or upon any ratification after full age of any promise or simple contract made during infancy, *unless* such promise or ratification were in *writing*, signed by the party to be charged therewith. The law on this subject however has recently been altered by "The Infants Relief Act, 1874" (37 & 38 Vict. c. 62), s. 2, which is as follows:—"No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." And this section applies to and makes void ratifications made after the passing of the Act, of contracts made before that time (*g*).

Contracts of insurance must in general be printed or written, whether the contract be a marine, fire, or life insurance (*h*).¹

*Another case is that of a promise to pay a [*153] debt barred by the Statute of Limitations; but, as I shall have occasion to speak again of that statute before the conclusion of these Lectures, I shall reserve

(*g*) Kibble, *Ex parte*, *In re* Onslow, L. R. 10 Ch. 373; 44 L. J. (Bank.) 63.

(*h*) 30 & 31 Vict. c. 23, s. 7, Sea. See 14 Geo. 3, c. 78, Fire; and 14 Geo. 3, c. 48, Life.

¹ This requirement is of statutory origin. There are similar statutes in Georgia: *Simonton v. Ins. Co.*, 51 Ga. 80; *Clarke v. Brand*, 62 Ib. 28; but they are not general in this country and in their absence parol contracts of insurance will be sustained, unless in conflict with some explicit provision in the charters of the companies. See Read on the Statute of Frauds, §§ 1125-27 and cases cited.

what I have to say regarding the writing by which its operation may be defeated.

Now, these are the principal cases in which the law of England requires that particular contracts should be reduced into writing; not that they are the only ones, for there are many statutes making writing necessary in certain particular transactions, but these are the cases of most frequent occurrence, and therefore fittest to be here mentioned.

Having now, therefore, pointed out to you the practical distinction which exists between the written and verbal contracts, though both of them alike, if not sealed and delivered, rank but as *simple contracts*, it is time to touch on some points which apply to all simple contracts alike.

The first point to be remarked will, perhaps, at first sight, be considered as nearly self-evident, but much difficulty does, in fact, arise from not attending to it; and, upon a little consideration, it will appear important to be borne in mind: it is this, that the parties to the contract mutually assent to the same thing (*i*).

*“A contract,” says Pothier, “includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise.” Hence, assent or acceptance is indispensable to the validity of every contract; for, “as I cannot,” continues Pothier, “by the mere act of my own mind transfer to another a right in my goods, without a concurrent intention on his part to accept them, neither can I by my promise confer a right against my person until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right.” Wherever there is not an assent, express or implied (*k*), to the terms of the proposed

(i) See *Jordan v. Norton*, 4 M. & W. 155, *ante*, p. *147; *Foster v. Rowland*, 30 L. J. (Ex.) 396; *Felthouse v. Bindley*, 31 L. J. (C. P.) 204.

(k) As to an assent being implied to terms and conditions contained in a

contract by both parties, there is no mutuality, and no contract. Take for instance the case of *Hutchinson v. Bowker* (1). There, the defendants wrote to the plaintiffs offering them a certain quantity of "good" barley upon certain terms, to which the plaintiffs answered, after quoting the defendants' letter, as follows:—"Of which offer we accept, expecting you will give us fine barley and full weight." The defendants, in reply, stated that their letter contained no such expression as *fine* barley, and declined to ship the same. Evidence [*155] *was given at the trial that the terms "good" and "fine" were terms well known in the trade, and the jury found that there was a distinction in the trade between "good" and "fine" barley. It was held, that although it was a question for the jury what was the meaning of those terms in a mercantile sense, yet, that they having found what that meaning was, it was for the Court to determine the meaning of the contract; and the Court held that there was not a sufficient acceptance of the offer to make a complete contract. So, too, where the declaration stated that J. A. was indebted to the plaintiff, and that the defendant's agent, by written instrument, promised the plaintiff as follows:—"Mr. A., the defendant, offers to pay a composition of 7s. in the £ on your account against his nephew, J. A., on your giving proper indemnification to both. In the event of your accepting the offer I will thank you to forward me full particulars of your account, in order that the same may be properly examined;" that the plaintiff accepted the offer of the defendant, and forwarded the full particulars of his account, and had always been ready and offered to give a proper in-

printed ticket, from an acceptance of the ticket without objection, see *Watkins v. Rymill*, 10 Q. B. D. 178; 52 L. J. (Q. B.) 121, and the cases there cited.

(1) 5 M. & W. 535.

demnification to J. A. and the defendant, yet the defendant did not pay the composition: this declaration was held bad upon demurrer, as showing nothing more than an overture. Indeed, the very leaving of the terms of the indemnity open shows it to be incomplete. Clearly the defendant never intended to *pay unless he got such an indemnity as he should [*156] think proper, not what the plaintiff or a third person should think sufficient (*m*).

Again, though there may be an assent to the terms of the proposed contract by both parties, yet if one party is induced to assent, believing through the fraudulent misrepresentation of the other that that other is some one else than he really is, then there is no contract because there is no agreement as to who the parties are, one man thinking only that he is contracting with another, when he is not really doing so. And if the man thus imposed upon furnishes goods under such a supposed contract, the fraudulent acquirer cannot give a good title to any one who purchases from him, though for valuable consideration and without notice of the fraud, unless the sale be in market overt. This is shown by the recent case of *Lindsay v. Cundy*. There, one Blenkarn took premises at 37, Wood Street, London, and wrote to the plaintiffs at Belfast, ordering goods of them. The letters were dated 37, Wood Street, and signed "A. Blenkarn & Co.," in such a way as to look like "A. Blenkiron & Co.," there being an old established firm of Blenkiron & Sons at 123, Wood *Street. One of the plaintiffs knew [*157] something of that firm, and the plaintiffs entered

(*m*) *Cope v. Albinson*, 22 L. J. (Ex.) 37; 8 Ex. 185; *M'Iver v. Richardson*, 1 M. & S. 557; *Mozley v. Tinkler*, 1 C. M. & R. 692; *Russell v. Thornton*, 29 L. J. Ex. 9; 30 L. J. (Ex.) 69; see the judgment of Kindersley, V. C., in *Re Leeds Banking Company*, 35 L. J. (Ch.) 75; *Oriental Island Steam Company v. Briggs*, 31 L. J. (Ch.) 241.

into a correspondence with Blenkarn, and ultimately supplied the goods ordered, addressing them to "A. Blenkiron & Co., 37, Wood Street." The fraud having been discovered, Blenkarn was indicted and convicted for obtaining goods by falsely pretending that he was Blenkiron & Sons. Before the conviction the defendants had purchased some of the goods *bonâ fide* of Blenkarn without notice of the fraud, and re-sold them to other persons. The plaintiffs having brought an action for the conversion of the goods; it was held by the Court of Appeal (*n*), reversing the judgment of the Queen's Bench Division, and afterwards by the House of Lords (*o*), affirming the judgment of the Court of Appeal, that the plaintiffs intended to deal with Blenkiron & Sons, and therefore there was no contract with Blenkarn; that the property in the goods never passed from the plaintiffs, and that they were accordingly entitled to recover in the action. But mere error in the absence of fraud, as to the person with whom the contract is made, only annuls the contract if personal [*158] considerations enter *into it; if the person sought to be bound would have been equally willing to make the same contract with any other person, it would stand (*p*).¹

(*n*) *Lindsay v. Cundy*, 2 Q. B. D. 96, 46 L. J. (Q. B. etc.) 233; reversing 1 Q. B. D. 348, 45 L. J. (Q. B. etc.) 381.

(*o*) *Cundy v. Lindsay*, 3 App. Cas. 459, 47 L. J. (Q. B., etc.) 481 (H. L.). And see *Hardman v. Booth*, 1 H. & C. 803; 32 L. J. (Ex.) 105; *Higsons v. Burton*, 26 L. J. (Ex.) 342.

(*p*) *Smith v. Wheatcroft*, 9 Ch. Div. 223.

¹ Thus a contract for the performance of particular personal services is not assignable without the assent of the parties: *Chapin v. Longworth*, 31 Ohio St. 421; so that when an author agrees with a particular firm to publish a forthcoming work, this contract cannot be assigned by the publishers, without the author's consent, to another firm: *Hole v. Bradbury*, 12 Ch. Div. 886. Where the defendants had been in the habit of dealing with a particular person, who was in debt to them, and they sent an order for goods intending it to be filled by this party, but it came into the hands of the plaintiff, the successor in business of the party with whom they had been in the habit of

The assent to a contract must be to the precise terms offered. Where one party proposes a certain bargain, and the other agrees subject to some modification or condition, there is no mutuality of contract until there has been an assent to it so modified; otherwise it would not be obligatory on both parties, and would therefore be void (*q*). There is a clear distinction between a mere proposal and an agreement to sell. As in *Cooke v. Oxley*, where the defendant offered goods to the plaintiff and gave him till four o'clock in the afternoon, the plaintiff did not within the time express that he acceded to the proposal, and was therefore held not entitled to sue the defendant for non-delivery of the goods. The engagement was all on one side, and the defendant had a right until four o'clock to sell the goods to any other person (*r*). In like manner [*159] *where a broker sold on Saturday certain goods of the defendant to the plaintiff, subject to the plaintiff's approval of the quality on Monday, and sent the sold note to the plaintiff on Saturday marked with the

(*q*) *Jordan v. Norton*, 4 M. & W. 155; *Cooke v. Oxley*, 3 T. R. 653; *Re Leeds Banking Company*, *Mallorie's case*, 36 L. J. (Ch.) 141; L. R. 2 Ch. 181; *Re Universal Banking Corporation, ex parte Gunn*, 37 L. J. (Ch.) 40; *Re Saloon Steam Packet Co., ex parte Fletcher*, *Ib.* 49. But a binding contract may be made by letters or other writings, although they may contain a reference to the preparation of a more formal contract thereafter. *Bonnewell v. Jenkins*, 8 Ch. Div. 70; 47 L. J. (Ch.) 758; *Rossiter v. Miller*, 3 App. Cas. 1124; 48 L. J. (Ch.) 10 (H. L.); *Lewis v. Brass*, 3 Q. B. D. 667.

(*r*) 3 T. R. 653.

dealing who sent the goods, it was held that the plaintiff could not recover their price: *Bramwell, B.*, said: "When a contract is made, in which the personality of the contracting party is, or may be, of importance, as a contract with a man to write a book, or the like, or where there might be a set-off, no other person can interpose and adopt the contract": *Boulton v. Jones*, 2 H. & N. 564; *Boston Ice Co. v. Potter*, 123 Mass. 28; *Paddock v. Colby*, 18 Vt. 485. On the other hand when the personal character of the party dealt with can have no effect upon the contract, or where a party has notice with whom he is dealing, a mistake of identity, in the absence of fraud, might justify the rescission of the contract, but not its avoidance after he has received the goods: *Boston Ice Co. v. Potter, supra*; *Mudge v. Oliver*, 1 Allen, 74.

words "quality to be approved on Monday," and the plaintiff not having approved or disapproved on the Monday, the broker, a few days after, sent the sold note to the defendant with those words struck out, and the defendant then repudiated the engagement; it was held that he had no right to do so, for the plaintiff, not having signified his disapproval on Monday, was then bound by it, and the engagement, being mutual, was a perfect contract. This case, it will be observed, differs from *Cooke v. Oxley*, which was an offer to sell not accepted within the time given. Here was not merely an offer to sell, but the buyer had an option of renouncing the purchase on Monday, and not having renounced, the contract had become absolute (s). The case of *Routledge v. Grant* (t) is also a good example of this principle. Grant offered to purchase Routledge's house, requiring possession on the 25th of July, and a definite answer in six weeks; Routledge accepted the offer, with possession on the 1st of August; Grant afterwards, within the six weeks, retracted his offer, and it was held that he had a right to do so.

The party who made the offer has a right to say, [*160] *"Non hæc in fœdera veni;"* and to decline any other bargain than that which he offered. Where an offer is accepted in the terms in which it was made, the contract is binding on both parties. At any time before it is accepted the offer may be rescinded, but not afterwards (u). The importance of ascertaining accurately that the offer which the one party has made has not been altered by any term or stipulation introduced by the other in accepting it, is so great, that another example or two will be useful. Thus, a broker

(s) *Humphreys v. Carvalho*, 16 East, 45.

(t) 4 Bing. (13 E. C. L. R.) 653.

(u) *Cooke v. Oxley*, 3 T. R. 653.

sold to Cowie, of Calcutta, a quantity of indigo, and drew up a sold note addressed to the vendor, who having objected to a particular word, Cowie struck his pen through it, placing his initial over the erasure, and returned it to the broker, who delivered it so altered to the vendor. The broker afterwards delivered to Cowie a bought note which differed materially from the sold note. In an action brought by the vendor against Cowie for non-performance of the contract as stated in the sold note, the Supreme Court at Calcutta considered that the sold note formed the contract, and found for the plaintiff; but the Judicial Committee of the Privy Council, upon appeal, considered that the parties intended the bought and sold notes together to form the agreement between the parties, notwithstanding Cowie's alteration of the sold note, and consequently, [*161] that *there being a material variation in the terms of the bought and sold notes, they did not together constitute a binding contract (x). In another case, a broker, acting for the plaintiff, verbally contracted to buy certain hemp of the defendant, and sent him a note stating the terms, commencing thus:—"Sold, for Campbell (the defendant), to Moore (the plaintiff), 50 tons of Petersburg clean hemp, ex G. G. to arrive, at £34 per ton, payment at the option of the buyer by acceptance on London at six months from delivery, or cash in 14 days less 2½ per cent.; to be taken from the quay at the landing weights, and to be a fair average quality of the season." The defendant sent back another note in these words:—"I have this day sold, through you, to M. 50 tons Petersburg clean hemp, expected to arrive per G. G. at £34 per ton from the quay. If the ship is lost, or the hemp damaged on the voyage, this contract to be considered void for such

(x) *Cowie v. Remfry*, 5 Moore (P. C.) 232.

quantity as may be lost or damaged. The quality to be of an average of the season, and if any dispute arises, the same to be settled by arbitration. Payment, six months' acceptance, or cash in 14 days less $2\frac{1}{2}$ per cent. discount, at the buyer's option. Customary allowances." The plaintiff sued for non-delivery of the hemp, treating the note signed by the defendant as the contract, and it was held that the liability of the defendant [*162] depended upon the *question of fact, whether the note signed by him was intended by both parties to be the contract, in which case he would be liable, or whether the defendant only intended to be bound as the seller, provided the plaintiff should also sign a note to bind himself as the buyer. "If this were a case," said *Parke*, B., in delivering the judgment of the Court of Exchequer, "in which the plaintiff sought to prove a contract by means of bought and sold notes, made by a broker for both parties, he must have failed, for the two notes disagree, and there would have been no valid contract. This, however, is not the case of a contract entered into by a broker for the buyer and seller; the person who made the contract was, indeed, a broker, but he acted solely for the plaintiff. The plaintiff then insists that the note signed by the defendant is the contract, and if it be true that this was intended by both parties to be the contract between them, the defendant would be bound as a party to be charged, and the memorandum would be sufficient within the Statute of Frauds. But if *Campbell*, the defendant, never intended to be bound as the seller unless *Moore* was also bound as the buyer, and meant that *Moore* should sign the note on his part to bind him, then there was no valid contract between them" (y).

(y) *Moore v. Campbell*, 10 Ex. 323; 23 L. J. (Ex.) 310; see *Heyworth v. Knight*, 33 L. J. (C. P.) 298.

That the acceptance of the *offer, in order to be binding, must not be qualified by any fresh [*163] stipulation not contained in the offer, has also been strongly shown in contracts for the purchase of scrip and shares. These contracts are often made by letters, the intended purchaser applying by letter for shares, and the answer, after complying with this request, going on to stipulate that the shares should not be transferable, or adding some term not contemplated by the applicant (z). In such cases, in the absence of assent to the additional stipulation, the contract would be void; and no such allottee could be sued on the transaction, for the stipulation was clearly not implied in the agreement to take the shares.

Where the offer of a contract is made by letter, the offerer must be considered as making during every instant of the time his letter is travelling the same identical offer to the receiver (a). In like manner the receiver's acceptance of the contract is complete when in due time he sends his answer. This due time is ascertained by the usage of trade, by the actual stipulation of the parties, or by what is a reasonable time under the circumstances (b). When the post is either *directly [*164] or impliedly appointed by the party making the offer to be the channel of communication, the contract is complete when the letter accepting the offer is posted, even if the letter of acceptance never reaches its destination.¹ The party accepting has then done all he

(z) *Wontner v. Shairp*, 4 C. B. (56 E. C. L. R.) 404; *Walstab v. Spottiswood*, 15 M. & W. 501; *Vollans v. Fletcher*, 1 Ex. 20; *Duke v. Andrews*, 2 Ex. 290; *Chaplin v. Clarke*, 4 Ex. 403; *Re Direct Birmingham Railway Company, ex parte Capper*, 19 L. J. (Ch.) 394.

(a) *Adams v. Lindsell*, 1 B. & A. 681.

(b) *Adams v. Lindsell*, *supra*; *Meynell v. Surtees*, 25 L. J. (Ch.) 259.

¹ In *Lewis v. Browning*, 130 Mass. 173, Gray, C. J., said: "In *M'Culloch v. Eagle Ins. Co.*, 1 Pick. 278, this Court held that a contract made by mutual

was bound to do (c). Until acceptance, the offerer may revoke his offer (d); but the revocation, in order to operate as such, must be communicated to the party to whom the offer has been made before the latter has accepted it. For example, merely posting a letter of revocation which does not reach the party to whom the offer is made till after the latter has posted a letter of acceptance, would not be sufficient (e). The acceptance [*165] of the offer, in order to be *binding, must, as we have already seen, not be qualified by some stipulation not contained in the offer. It is perhaps hardly necessary to add that the law as to the acceptance and retraction of offers is the same *mutatis mutandis*,

(c) So held in *Household Fire Insurance Co. v. Grant*, 4 Ex. Div. 216, 48 L. J. (Q. B., etc.) 577, by a majority of the Court of Appeal (*Thesiger* and *Baggallay*, L. J.J., *dissentiente Bramwell*, L. J.). This case overrules *The British and American Telegraph Co. v. Colson*, L. R. 6 Ex. 108; 40 L. J. (Ex.) 97. See also *Dunlop v. Higgins*, 1 H. of L. C. 381 (where, however, the letter of acceptance did reach its destination, though after a delay caused by circumstances over which the sender had no control); *Re Imperial Land Co. of Marseilles*, *Harris's case*, L. R. 7 Ch. App. 587; 41 L. J. (Ch.) 621; *Wall's case*, *re the same Company*, L. R. 15 Eq. 18; 42 L. J. (Ch.) 372.

(d) *Cooke v. Oxley*, 3 T. R. 653; *Routledge v. Grant*, 4 Bing. (13 E. C. L. R.) 653; *Warner v. Harrison*, 28 L. J. (Q. B.) 18.

(e) *Byrne v. Van Tienhoven*, 5 C. P. D. 344; 49 L. J. (C. P.) 316; *Stevenson v. McClean*, 5 Q. B. D. 346; 49 L. J. (Q. B.) 701; *Re Imperial Land Company of Marseilles*, *Harris's case*, L. R. 7 Ch. App. 587; 41 L. J. (Ch.) 621.

letters was not complete until the letter accepting the offer had been received by the person making the offer; and the correctness of that decision is maintained, upon an able and elaborate discussion of reason and authorities, in *Langdell on Contracts* (2d ed.), 989-996. In England, New York, and New Jersey, and in the Supreme Court of the United States, the opposite view has prevailed, and the contract has been deemed to be completed as soon as the letter of acceptance has been put into the post-office duly addressed. [He cited the English cases referred to in the text and also] 2 Kent Com. 477 note c.; *Mactier v. Frith*, 6 Wend. 103; *Vassar v. Camp*, 1 Kernan, 441; *Trevor v. Wood*, 36 N. Y. 307; *Hallock v. Commercial Ins. Co.*, 2 Dutcher, 268, and 3 Dutcher, 645; *Taylor v. Merchants' Ins. Co.*, 9 How. 390. But this case does not require a consideration of the general question; for in any view, the person making the offer may always, if he chooses, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance."

whatever be the means of communication employed.¹ "It cannot make any difference whether the negotiation is carried on by post, by telegraph, or by oral message. If the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived. But if it is retracted there is an end of the proposal" (f).

I have already stated to you that one of the main distinctions between a contract by *deed* and a simple contract is, that *the latter requires a consideration to support it*, the former not.² And here it is proper to observe, incidentally, that when I say that a contract by deed does not require a consideration to support it, I mean to say that it does not require a consideration for the purpose of binding the party who executes it, and rendering him liable. I do not by any means intend that you should understand that a consideration may not come to be a most important ingredient in a contract by deed, as between parties claiming a benefit under that deed and other parties having conflicting claims upon the person

(f) Per *Lush, J.*, in *Stevenson v. McClean*, 5 Q. B. D. 346, 351; 49 L. J. (Q. B.) 701, 704.

¹ As to contracts by letter, see *Abbott v. Shepard*, 48 N. H. 14; *Stockham v. Stockham*, 32 Md. 196; *Brown v. N. Y. C. R. R. Co.*, 44 N. Y. 79; *Chicago R. R. Co. v. Dane*, 43 Ib. 240; *Knight v. Cooley*, 34 Iowa, 218. As to contracts by telegraph, see *Trevor v. Wood*, 41 Barb. 255; 36 N. Y. 307; *Beach v. Raritan R. R. Co.*, 37 N. Y. 457; *Wells v. Milwaukee R. R. Co.*, 30 Wis. 605; *Duble v. Batts*, 38 Tex. 312; *Deshon v. Fondick*, 1 Wood, 286. [See page *96 as to the application of the Statute of Frauds to contracts by Telegraph.]—s.

² Upon the important subject of the rise and development of the doctrine of consideration recent research has thrown much light. The subject cannot be adequately treated in this place, but a few references may be useful to the student who desires further information. The most learned discussion of the subject, historically and philosophically, is that of Professor Holmes (*Common Law, Lectures VII. and VIII.*). For an analysis of the case law see Professor Langdell's *Select Cases on Contracts*, and for a clear statement of the principles of the modern law see his *Summary of the Law of Contracts*, §§ 45–98. See also Judge Hare's "*Notes of a Course of Lectures on Contracts*," Lect. I., and, generally, the recent writers on contracts, Anson, Leake, Pollock, and Wharton.

executing it. For instance, the statute of the 13th Eliz. c. 5, *renders a great variety of deeds (if made [*166] without a valuable consideration) void as against creditors; and this statute (which Lord Mansfield has said is only declaratory of the Common Law) is founded on a perfectly righteous and equitable principle; for how absurd and unjust would it be to allow a man to defeat the claims of his real creditors by entering into obligations to persons who had never parted with any value at all. When, therefore, I say that a deed is good *without consideration*, I do not mean to say that it stands for all purposes on the same footing as an instrument for which value has passed; but what I mean that you should understand is this—that where the interests of third parties are not affected, but the question is between the person who entered into the contract and the person with whom it is made, there a man cannot defend himself against a promise made by deed, by saying that he received no consideration for it, although he might defend himself upon that ground against the very same promise if it had been made by simple contract. I cannot, I think, put a better example of this than that which I put in a former lecture:—A. owes B. £50. Now, if I write upon a piece of paper as follows:—

“I promise A. that I will discharge for him the debt due from him to B.”

and give him the paper so written, here is a simple contract without any consideration for it; and, if I fail to perform the promise, no action will lie against *me, [*167] because a simple contract founded upon no consideration cannot be enforced: and yet, if I had sealed that very slip of paper, and delivered it to A. as my act and deed, an action would have lain against me had I afterwards failed in performing it; and to that action it would have been no defence to say that I received no

consideration for my undertaking: I might say, that I had been imposed upon, and persuaded to execute it by A.'s fraud; or I might say, that the debt due to B. was an illegal one, and that my promise was made in pursuance of an illegal arrangement; but that the promise was without consideration would be a defence of which, the contract being by deed, I could not be allowed to avail myself.¹

But a simple contract is, as I have said, incapable of becoming the subject of an action unless supported by a consideration.² *Ex nudo pacto non oritur actio* is an old and well-established maxim of our law, as well as of the civil law, and has been illustrated by a great variety of cases from time to time (*g*): thus it has been laid down by Lord *Kenyon* (*h*), that a promise made by the captain of a ship to one of his seamen, when the ship was in *extraordinary danger, to pay him [*168] an extra sum of money as an inducement to extra exertion, was a void promise; because every seaman is bound to exert himself to the utmost for the safety of the ship, and therefore the captain would get nothing from the seaman in exchange for his promise except that which the seaman was bound to do before.³ And it has been

(*g*) *Westhead v. Sproson*, 30 L. J. (Ex.) 265; *McManus v. Bark*, L. R. 5 Ex. 65; 39 L. J. (Ex.) 65. See also *Dashwood v. Jermyn*, 12 Ch. Div. 776.

(*h*) *Harris v. Watson*, Peake, 72; *Harris v. Carter*, 23 L. J. (Q. B.) 295; 3 E. & B. (77 E. C. L. R.) 559. See *Clutterbuck v. Coffin*, 3 M. & G. (42 E. C. L. R.) 842; *Hartley v. Ponsonby*, 26 L. J. (Q. B.) 322.

¹ It has been before stated, that in some of the United States, the obligor of a specialty is, by statutory enactment, permitted, under some restrictions, to show its failure, as at common law, he could its illegality of consideration.—R.

² *Ames v. Taylor*, 49 Me. 381; *Richardson v. Williams*, Ib. 558; *Dorwin v. Smith*, 35 Vt. 69; *Smith v. Rogers*, Ib. 140; *Newhall v. Paige*, 10 Gray, 366; *Carr v. Card*, 34 Mo. 513; *Conover v. Stillwell*, 34 N. J. 54; *Glasgow v. Hobbs*, 32 Ind. 440; *Worth v. Carr*, 42 N. Y. 362.—s.

³ And to the same effect were *Newman v. Walters*, 3 B. & P. 612; *Stilk v. Myrick*, 2 Camp. 317; *Smith v. Bartholomew*, 1 Metc. 278. [*Robb v. Mann*,

held, that interest, being by merchantile usage payable upon balances, an agreement in consideration of interest upon a balance to give an extended time for paying it, was merely void (*i*). The documents put in by the defendant, said *Parke*, B., showed that interest was payable at the time of the contract, and therefore there was no consideration for that contract.

The reason for the strictness with which this rule of law—that there must be a consideration to support a simple contract—is enforced, is, to guard persons against being drawn hastily and inconsiderately into engagements which may prove ruinous to them. The law does not absolutely prohibit them from contracting a gratuitous obligation, for they may, if they will, do that by deed; and it is thought that, a deed being an instrument requiring more of ceremony and formality, and sealing being considered all over Christendom as an act of much solemnity, and as suggesting the [*169] *contract to be extraordinary and important, more opportunity for thought is afforded to the party executing it than to a person entering into a simple contract, and, consequently, that it is not unreasonable to give it a more stringent operation.

The reason of the law of England on this point—one of the most important in our entire system—is very clearly explained in the judgment of the Court of Queen's Bench in *Eastwood v. Kenyon* (*k*), the case which I before mentioned with reference to the 4th section of the Statute of Frauds.

The Lord Chief Justice remarks, in that case, that

(*i*) *Orme v. Galloway*, 23 L. J. (Ex.) 118; 9 Ex. 544. See also *Beer v. Foakes*, 11 Q. B. D. 221; 52 L. J. (Q. B.) 712, reversing *Ib.* 426.

(*k*) 11 Ad. & E. (39 E. C. L. R.) 438, 450; 9 L. J. (Q. B.) 409, 412.

11 Pa. St. 300; *Gilmore v. Green*, 14 Bush, 772; *Bryan v. Brazil*, 52 Iowa, 350.]—R.

“the eminent counsel who argued for the plaintiff in *Lee v. Muggeridge* (*l*), spoke of Lord *Mansfield* as having considered the rule of *nudum pactum* too narrow, and maintained that all promises deliberately made ought to be binding at law; as they certainly are in honor and conscience.” But the Chief Justice continues: “The enforcement of such promises at law, however plausibly reconciled by the desire to carry into effect all conscientious engagements, might be attended with mischievous consequences to society—one of which would be the frequent preference of voluntary undertakings to claims for just debts.¹ Suits would thereby be multiplied, and voluntary undertakings would be also multiplied, to the prejudice of real *creditors. The temptations of executors [*170] would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.”

Perhaps, it may be added, that if this rule were not law, an expression of present intention, of mere good will, of no more than opinion (*m*), or even a civil and indirect refusal, would continually be made the grounds of actions; for no one can have seen much of society, or attended much in Courts of Justice, without having observed how frequently such expressions are taken by the recipient in a sense very much more favourable to his interests and wishes than they were intended by the utterer to bear (*n*).

(*l*) 5 Taunt. (1 E. C. L. R.) 36. The counsel were Mr. Serjt. *Lens*, and Mr. Serjt. *Best*, afterwards Lord *Wynford*.

(*m*) *Nicholson v. Ricketts*, 29 L. J. (Q. B) 95.

(*n*) See *Puffendorff's Law of Nature*, B. 3, cap. 5; and *Shadwell v. Shadwell*, 30 L. J. (C. P.) 97.

¹ Thus services voluntarily done by one for another, without his privity or consent, afford no ground for an action, however meritorious they may be, as, for instance, in saving his property from fire: *Bartholomew v. Jackson*, 20

Now, with regard to the question—*What does the law of England recognize as a consideration capable of supporting a simple contract?* The best and most practical answer is,—*Any benefit to the person making the promise, or any loss, trouble, or inconvenience to, or charge upon the person to whom it is made.*¹ Sir Wm. Blackstone, in the second volume of his Commentaries (p. 444), following the arrangement of the civilians, divides considerations into four classes: 1st. *Do ut des*, where I give something that something may be given to me; 2d. *Facio ut* [*171] *facias*, where I do something that *something may be done for me; 3d. *Facio ut des*, where I do something that something may be given to me; and 4th. *Do ut facias*, where I give something that something may be done for me. Divisions of this sort are useful for the sake of arranging our ideas, and testing their clearness; but the short practical rule is, as I have said, that *any benefit accruing to him who makes the promise, or any loss, trouble, or disadvantage undergone by, or charge imposed upon, him to whom it is*

Johns. 28; or by doing additional work to a particular job: *Hart v. Norton*, 1 M'Cord 22.—R.

¹ The statement in the text, although it is the commonly accepted form of definition of consideration, cannot be allowed to pass without criticism. The more careful analysis of some of the modern writers on this subject has eliminated one of the terms of the definition and only admits *detriment to the promisee* as a valid consideration. This of course refers to detriment in a legal sense, *i. e.*, the doing of something which the promisee was not legally bound to do, or the omission to do something which he had the legal right to do. This constitutes a valid consideration for the promise of the other party made in exchange for it, and the contract is complete. But unless this element be present the contract is imperfect, for consideration is wanting; no matter how great the advantage experienced by the promisor, the promisee cannot enforce the promise unless he has contributed to that benefit by some voluntary act or forbearance, something done or suffered, on his part. In effect this is only another way of stating the rule (which is explained *infra* *175) that the consideration must move from the promisee—nothing done by C. will support a promise by A. to B. See Langdell, Summary of the Law of Contracts, §§ 62, 63; Wharton, Contracts, § 505; Holmes, Common Law, Lect. vii.

made, is a sufficient consideration in the eye of the law to sustain the promise. Thus, let us suppose I promise to pay B. £50 at Christmas. Now, there must be a consideration to sustain this promise. It may be that B. has lent me £50: here is a consideration by way of advantage to me.¹ It may be that he has performed, or has agreed to perform, some laborious service for me: if so, here is a consideration by way of inconvenience to him, and of advantage to me at the same time. It may be that he is to labour for a third person at my request: here will be inconvenience to him without advantage to me: or, it may be that he has become surety for some one at my request; here is a charge imposed upon him. Any of these will be a good consideration to sustain the promise on my part. Illustrations of this rule you may collect from various instances, among which I will refer you to *Williamson v. Clements* (o), where the defendant being indebted *to the plaintiff on a bill of exchange endorsed to him, the plaintiff having lost that bill, gave to the defendant, at his request, a bond acknowledging that the bill was paid, and containing a condition for indemnifying the defendant against his afterwards being compelled to pay the bill; and the defendant, in consideration thereof, promised the plaintiff to pay him the amount of the bill. It will be observed, that it was a detriment to the plaintiff to acknowledge the bill to have been paid, since he thereby gave up any claim upon the bill which he might otherwise have had if he had found it. So in *Whitehead v. Greetham*, decided in the Exchequer Chamber (p), the declaration stated that the plaintiff had retained the defendant at his

(o) 1 Taunt. 523.

(p) 2 Bing. (9 E. C. L. R.) 464; *Shillibeer v. Glyn*, 2 M. & W. 143.

¹ Obviously, however, of equal disadvantage to B.

request to lay out £700 in the purchase of an annuity for him; that the defendant promised to lay it out securely, and that the plaintiff delivered him the money for that purpose; and the Court held that there was a good consideration for that promise. It was clearly a detriment to the plaintiff to part with his £700. In another instance, one Charles Kennedy being indebted to the firm of Boeme and Smout, and the plaintiff having been appointed by the Court of Chancery receiver of the debts due to the firm, in consideration that the plaintiff would give C. Kennedy two months' time to pay, the defendant promised the [*173] plaintiff to pay him at the *expiration of that period should C. Kennedy not do so. Here it is observable, that the plaintiff did not interfere as a stranger in the concerns of the firm for which he was appointed receiver. It was his duty to require the debtor to pay, and the duty of the debtor to pay him. The contract, therefore, to forbear to proceed against the debtor was a contract from which the plaintiff might incur a detriment, and it is a sufficient consideration for a contract if one party receives a benefit, or the other is exposed to a detriment from it (*q*). By a similar course of reasoning, the case of *Hartley v. Ponsoby* was decided,—a case so nearly resembling in its circumstances that of *Harris v. Watson*, recently mentioned (*r*), that many were startled by the decision, as if it had been inconsistent with the latter. A ship being on a voyage from Liverpool to Port Philip and back, when in Port at P., became so short handed that it was dangerous to life to proceed with only the

(*q*) *Willatts v. Kennedy*, 8 Bing. (21 E. C. L. R.) 5; *Bunn v. Guy*, 4 East, 190; *Surtees v. Lister*, 30 L. J. (Ex.) 369; *Cooke v. Wright*, 30 L. J. (Q. B.) 32; *Scotson v. Pegg*, 30 L. J. (Ex.) 225.

(*r*) *Ante*, p. *167.

reduced crew. The captain being unable to procure additional hands, promised the able seamen remaining, who were under articles for the whole voyage, an additional sum if they would assist in taking the ship to the next port. It was held that the seamen were not bound to proceed on the voyage, as it involved *risk of life, and that the promise was therefore [*174] not *nudum pactum*, and was binding on the captain (s). In this case, it will be observed that the proceeding in the ship which had been rendered unfit for the voyage by the loss of a portion of the crew was not obligatory on the remainder, but was a detriment to them which they had not engaged to undergo; as well as a benefit to the captain which he was not entitled to demand. In a more recent case the defendant being in the employment of the plaintiffs in one capacity, agreed with them to serve them in another, it being understood at the time that the terms of their agreement should be reduced into writing. He thereupon entered into the latter employment, and being in it the written agreement was signed by him stating that in consideration of his entering into the plaintiff's employment at such a salary, he thereby agreed to do so, with the understanding that if he performed similar services for any other on the same ground he should pay the plaintiffs the sum of £50. It was argued that having already entered on his new employment before he signed the agreement, he was in their employ on an implied contract, to serve them on his part, and to be paid on theirs, and consequently that the superadded restriction not to serve other persons was without consideration. But it is clear, and was so considered by the *Court of Common Pleas, that the agree- [*175] ment was not perfected till it was signed, and

that if he had refused to sign it the plaintiffs might have refused to employ him any longer, and consequently that the consideration was really, as stated in the written agreement, his entering into the plaintiff's employment at such a salary (*t*).

In strict agreement with what has been said, this consideration must proceed from the party to whom the promise is made. If it proceed from some third person, not in any way moved or affected thereto by the promisee, the latter is a stranger to the consideration, and a promise made to him is *nudum pactum*. Thus, in the case of *Thomas v. Thomas* (*u*), an action was brought upon an agreement between the executor of A. B. and the widow of the testator, which set out that the testator had declared his wish that his widow should enjoy certain premises for her life, and that it was agreed, in consideration of such desire and of the premises, that the executor should convey them to the widow, provided she would pay £1 towards the ground rent of those and certain other premises, and keep the premises conveyed in good repair; and it was contended, that the real consideration of the executor's promise was the desire to comply with the wish of the testator. The

[*176] Court *considered this no part of the consideration. "Consideration," said Mr. Justice *Paterson*, "means something which is of some value in the eyes of the law moving from the plaintiff. It may be of some benefit to the plaintiff, or some detriment to the defendant, but at all events, it must be moving from the plaintiff. Now, that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff;

(*t*) *Mumford v. Gething*, 29 L. J. (C. P.) 105.

(*u*) 2 Q. B. (42 E. C. L. R.) 851. See *Price v. Easton*, 4 B. & Ad. (24 E. C. L. R.) 433.

it moves from the testator, and, therefore, legally speaking, it forms no part of the consideration." The following case also proceeds on the same ground. Very soon after a marriage between the plaintiff and the daughter of A., the fathers of both parties agreed, in order to supply a marriage portion, to pay each of them a sum of money to the plaintiff, and that the plaintiff should have full power to sue for both sums, but the agreement was made by and between the two fathers only. After the deaths of both, the plaintiff sued the executor of A. for the sum which he had agreed to pay, but he was not allowed to succeed, as he was no party to the agreement, and no consideration moved from him (x).

Provided there be some *benefit* to the contractor, or some *loss, trouble, inconvenience, or charge*, imposed upon the contractee, so as to constitute a *consideration*, the Courts are not willing to enter *into the question whether that consideration be *adequate* in [*177] value to the thing which is promised in exchange for it.¹ Very gross inadequacy, indeed, would be an index

(x) *Tweddle v. Atkinson*, 30 L. J. (Q. B.) 265.

¹ *Hubbard v. Coolidge*, 1 Metc. 93; *Osgood v. Franklin*, 2 Johns. Ch. 23; s. c. 14 Johns. 527; *Bedel v. Loomis*, 11 N. H. 9. "If a contract is deliberately made without fraud," said Wilde, J., in *Train v. Gold*, 5 Pick. 384, "and with a full knowledge of all the circumstances, the least consideration will be sufficient."—R.

"A consideration is sufficient," says Judge Rogers, in *Hind v. Holdship*, 2 Watts, 104, "if it arise from any act of the plaintiff, from which the defendant or a stranger derives any benefit, however small, if such act is performed by the plaintiff with the assent, express or implied, of the defendant; or by reason of any damages or any suspension or forbearance of the plaintiff's right at law or in equity; or any possibility of loss occasioned to the plaintiff by the promise of another, although no actual benefit accrues to the party promising. It is not essential that the consideration should be adequate in point of actual value. The law does not weigh the quantum of consideration, having no means of deciding on that matter; and it would be unwise to interfere with the facility of contracting, and the free exercise of the judgment and will of the parties. The law allows them to be the sole judges of the benefits to be derived from their bargains, provided there be no incompetency to contract,

of fraud, and might afford evidence of the existence of fraud; and fraud, as I have already stated to you, is a

and the agreement violates no rule of law. There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a contract between parties standing on equal ground, and dealing with each other without any imposition or oppression." And "the inequality," says Chancellor Kent, in *Osgood v. Franklin*, "amounting to fraud, must be so strong and manifest, as to shock the conscience and confound the judgment of any man of common sense." *Troy Academy v. Nelson*, 24 Vt. 189; *Robinson v. Threadgill*, 13 Ired. 39; *Brown v. Budd*, 2 Ind. 442; *Tompkins v. Phillips*, 12 Ga. 52. The doctrine that inadequacy of consideration will not vitiate an agreement does not apply to a mere exchange of sums of money, whose value is exactly fixed, but to the exchange of something in itself of indeterminate value, for money, or perhaps for some other thing of indeterminate value. The consideration of one cent will not support a promise to pay six hundred dollars: *Schnell v. Nell*, 17 Ind. 29; *Shepard v. Rhodes*, 7 R. I. 470. It is enough to support an executory contract that upon the contingency of its performance the requisite consideration must necessarily arise: *Poughkeepsie Co. v. Griffin*, 21 Barb. 454. The execution of a deed which conveys nothing is not a sufficient consideration to support a promise by the grantee to the grantor: *Murphy v. Jones*, 7 Ind. 529. It is not necessary that the consideration should pass from the person claiming the benefit of the promise: *Cailleux v. Hall*, 1 E. D. Sm. 5. A subscription to a common object with others, though gratuitous, creates a legal obligation: *McDonald v. Gray*, 11 Iowa, 508; *Norton v. Janvier*, 5 Harring. 346; *Trustees v. Robinson*, 21 N. Y. 234. An agreement by which one party is subject to trouble, loss or inconvenience is not a *nudum pactum*: *Findly v. Ray*, 5 Jones, 125; *Carr v. Card*, 34 Mo. 513. A promise by one to pay part of another's debt in discharge of the whole does not discharge it, and is therefore without consideration unless that other be a party to the agreement: *Whelan v. Edwards*, 29 Ga. 315. A promise to induce one to comply with an existing valid contract with a stranger is without consideration: *Johnson v. Sellers*, 33 Ala. 265. Doing that for which a reward is offered with knowledge of the offer is a consideration for the promise to reward: *Morrell v. Quarles*, 35 Ib. 544; *Ryer v. Stockwell*, 14 Cal. 134. A subscription on the faith of which expenses or liabilities have been incurred, is binding: *Doyle v. Glasscock*, 24 Tex. 200; *Wayne Institute v. Smith*, 36 Barb. 576. An existing liability is a good consideration for a promise, whether express or implied, to pay money on request: *Baily v. Bussing*, 29 Conn. 1. Payment by a debtor of a part of a sum already due and payable, is no legal consideration for an agreement to extend the time for the payment of the residue: *Hunt v. Bloomer*, 5 Duer, 202; *Stryker v. Vanderbilt*, 27 N. J. 68; *Gibson v. Irby*, 17 Tex. 173; *M'Cann v. Lewis*, 9 Cal. 246; *Liening v. Gould*, 13 Ib. 598; *State v. Davenport*, 12 Iowa, 335. The payment of interest in advance is sufficient consideration to support an agreement for further forbearance: *Dickerson v. Commissioners* 6 Ind. 128; *Warner v. Campbell*, 26 Ill. 282. Making a payment on a note before it is due is sufficient consideration to support a promise to extend the time: *Newsam v. Finch*, 25 Barb. 175. A

ground on which the performance of any contract may be resisted. But if there be no suggestion that the party promising has been defrauded or deceived, the Court will not hold the promise invalid upon the ground of mere *inadequacy*; for it is obvious, that, to do so, would be to exercise a sort of tyranny over the transactions of parties who have a right to fix their own value upon their own labour and exertions, and would be prevented from doing so were they subject to a legal scrutiny, on each occasion, on the question whether the bargain had been such as a prudent man would have entered into. Suppose, for instance, I think fit to give £1000 for a picture not worth £50; it is foolish on my part; but, if the owner do not take me in, no *injury* is done. I *may* have my reasons. Possibly, I may think that I am a better judge of paintings than my neighbours, and that I have detected in it the touch of Raphael or Correggio. It would be hard to prevent me from buying it, and hard to prevent my neighbour from making the best of his property, provided he did not take me in by telling me a false story about it. Accordingly, in the absence of fraud, mere inadequacy of consideration is no *ground for avoiding a contract. You will see two remarkable instances of this in the cases of *Bainbridge v. Firmstone* (y) and *Wilkinson v. Oliveira* (z), in the former of which the defendant in consideration that the plaintiff had consented to allow the defendant to weigh certain boilers of the plaintiff, promised to deliver up the

(y) 8 A. & E. (35 E. C. L. R.) 743.

(z) 1 Bing. N. C. (27 E. C. L. R.) 490.

promise by a debtor that he will not pay a debt then past due until a future day named, and that he will then pay the same with interest, is held not to be a good consideration for the promise of the creditor to extend the time: *Kellogg v. Olmsted*, 25 N. Y. 189.—s.

boilers in the same condition as when he received that consent; and the Court held that the consideration was sufficient to sustain the promise. "We need not inquire," said Lord *Denman*, C. J., "what benefit he expected to derive. The plaintiff might have given or refused leave" (a). In the latter of these cases the defendant promised to give the plaintiff £1000 for the use of a letter which contained matters explanatory of a controversy in which the defendant was engaged, and the consideration was held not to be inadequate to support the promise.

There is an old case upon this subject, involving so singular a state of facts that I cannot forbear mentioning it. It is called *Thornborow v. Whiteacre*, and is reported 2 Ld. Raym. 1164.

It was an action in which the plaintiff declared that the defendant, in consideration of 2s. 6d. paid down, and £4 17s. 6d. to be paid on the performance of the agreement, promised to give the plaintiff two [*179] grains of rye corn on Monday, the 29th of *March, four on the next Monday, eight on the next, sixteen on the next, thirty-two on the next, sixty-four on the next, one hundred and twenty-eight on the next, and so on for a year, doubling on every successive Monday the quantity delivered on the last Monday.

The defendant demurred to the declaration; and upon calculation, it was found that, supposing the contract to have been performed, the whole quantity of rye to be delivered would be 524,288,000 quarters; so that, as Salkeld the reporter, who argued the demurrer, remarked, all the rye grown in the world would not come to so much. But the Court said, that though the contract was a foolish one, it would hold at law, and that

(a) See *Smith v. Smith*, 32 L. J. (C. P.) 149.

the defendant ought to pay something for his folly.¹ The case was ultimately compromised. I presume, however, that if, instead of demurring, the defendant had pleaded that he had been induced to enter into the contract by fraud, he would have been able to sustain his plea; since it seems obvious, on the face of the thing, that the plaintiff was a good arithmetician, who, by a sort of catch, took in a man unable to reckon so well. Probably, the plaintiff had taken his hint from the old story regarding the invention of the game of chess. But, by demurring, the defendant admitted that there was no fraud, and, consequently, the only question was on the validity of the contract in the absence of fraud; so that the case presents a strong example of the reluctance *of the Courts to enter into a ques- [*180] tion as to the adequacy of consideration.

This reluctance is also very strongly exemplified by some cases turning on contracts in restraint of trade. By the law of England, a contract in general restraint of trade is void; but if in partial restraint of trade only, it may be supported, provided the restraint be reasonable, and the contract founded on a consideration. And it was once laid down that the consideration must be *adequate*, and that the Courts would enter into the question of adequacy. However, they have now decided that they ought not to do so. These cases are particularly strong, for they are cases in which, contrary to the general rule of law, a consideration is required, even though the contract be by deed. I shall have occasion to mention them again in a subsequent lecture. At present, I will merely refer to the decisions (*b*).

(*b*) *Hitchcock v. Coker*, 6 A. & E. (33 E. C. L. R.) 438; confirmed by *Proctor v. Sargent*, 2 M. & Gr. (40 E. C. L. R.) 20; and *Green v. Price*, 13 M. & W.

¹ So in the old case in which the horse was sold for one barley-corn for the first nail in the horse's shoe, two for the second, and so on, doubling on each

The consideration must, nevertheless, be of *some* value in contemplation of the law; for instance, if a man make an estate at will in favour of another, this is an insufficient consideration, for he may immediately determine his will (*c*). So, too, where a son had given [*181] to his father a promissory note, *and, to an action brought by his father's executor against him upon it, he pleaded that he had just ground to complain of the distribution which the father had made of his property, as the father had admitted; and that it was thereupon agreed between them that the son should cease for ever to make any such complaint; and that the father would discharge him from liability on the note, and the cause of action in respect thereof; and that such agreement should be accepted in satisfaction of the note: the Court of Exchequer clearly held, that there was no consideration for the agreement of the father. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do could be no consideration (*d*).¹

695; 16 M. & W. 346, *S. C.*, in error; *Archer v. Marsh*, 6 A. & E. (33 E. C. L. R.) 959; and *Leighton v. Wales*, 3 M. & W. 545.

(*c*) 1 Roll. Abr. 23, pl. 29.

(*d*) *White v. Bluett*, 23 L. J. (Ex.) 36.

nail, the jury found, under the direction of the Court, for 8*l.*, the value of the horse: *James v. Morgan*, 1 Lev. 111.—R.

¹ In *Sykes v. Dixon*, 9 A. & E. (36 E. C. L. R.) 693, Lord Denman said: "To prove that Bradley was servant, a contract was put in, the operation of which was entirely on one side. It bound Bradley to serve the plaintiff, and no other person, for a specified time, and not to leave the service without giving twelve months' notice. . . . We think that the agreement put in was no contract of service; for it was altogether on one side. Bradley was to serve one person only; but that one was not bound to employ him. It was contended, for the plaintiff, that a promise must be implied, on the master's part, to pay Bradley for his labour; but that would be the same in any service to which Bradley might engage himself; it is no consideration for this contract." See also *Rosher v. Williams*, L. R. 20 Eq. 210; *Maull v. Vaughn*, 45 Ala. 134; *Pfeiffer v. Adler*, 37 N. Y. 164.

I think that I have now sufficiently explained what it is that the law recognizes as a consideration sufficient to support a promise without deed. I must not, however, conclude without noticing one class of cases which form a species of exception to the rule that a simple contract requires a consideration to support it. I allude to the case of a negotiable security, as a bill of exchange, or promissory note. These, not being under seal, are simple contracts; but there is this marked distinction between the situation in which they stand *and [*182] that in which any other simple contract stands, namely, that they are always *presumed* to have been given for a good and sufficient consideration, until the contrary is shown. And even if the contrary *be* shown, still, if the holder for the time being have given value for the instrument, his right to sue on it cannot be taken away by showing that the person to whom it was originally given could not have sued, unless, indeed, it be further shown that he (the holder) had *notice* of the circumstances, or that he took the security when overdue, which is a sort of constructive notice, and places him in the same situation as the party from whom he took it. But so long as nothing of that sort appears, every note and acceptance is *primâ facie* taken to have been given for good consideration, and every indorsement to have been made on good consideration (*e*).

(*e*) See the Act codifying the law relating to Bills and Notes, 45 & 46 Vict. c. 61. (Bills of Exchange Act, 1882) ss. 27-30. See also the cases collected, Byles on Bills, last ed.; Bayley on Bills, by Dowdeswell; and Smith's Mercantile Law, last ed., by Dowdeswell.

CONSIDERATION OF SIMPLE CONTRACTS.—EXECUTED CONSIDERATIONS.—WHERE EXPRESS REQUESTS AND PROMISES ARE OF AVAIL.—MORAL CONSIDERATIONS.—ILLEGAL CONTRACTS.—RESTRAINTS OF TRADE.

I ENDEAVOURED to explain in the last lecture what it is that the law of England recognizes as a consideration sufficient to support a promise without deed. I stated that any benefit to the person who makes the promise, or any loss, trouble, or disadvantage undergone by or charge imposed upon the person to whom it is made, will satisfy the rule of law in this respect. In order to render this as clear as possible, I am about, before proceeding to the next branch of the subject, to illustrate it by mentioning a few decided cases, in which certain considerations have been held sufficient to support the promises founded on them.

It has been frequently decided, that, if one man have a legal or equitable right of suit against another, his forbearance to enforce that legal or equitable right of suit is a sufficient consideration for a promise either by
 [*184] the person liable to him or *by any third person, either to satisfy the claim on which that right of suit is founded, or to do some other and collateral act. Thus, where (a) the plaintiff in an action of assumpsit stated in his declaration that he was the assignee of a bond for £728 2s. 6d., in which the defendant was the obligor, and that, in consideration that the plaintiff would receive payment on certain specified days, and forbear proceeding in the meanwhile, the

(a) *Morton v. Burn*, 7 A. & E. (34 E. C. L. R.) 19.

defendant had promised to pay on those days; after a verdict for the plaintiff, it was objected, in arrest of judgment, that there was no consideration for the promise; for that, if an action had been brought in the name of the obligee of the bond, the agreement of the assignee to forbear would have been no defence, upon a ground which I have already sufficiently explained, namely, that an obligation by deed cannot be discharged by an agreement without deed. The Court, however, decided that the consideration was sufficient; "for," said the Lord Chief Justice, "although the agreement to forbear would not be pleadable to an action in the name of the obligee, yet, unless the plaintiff *did* forbear according to his agreement, he would not be able to sue on the defendant's promise." Thus, again, where (b) the plaintiff, who had been appointed by the Court of Chancery a receiver of the debts and *moneys of a firm, agreed to give time of payment to a person who owed money to the firm, [*185] in consideration of which a third person promised to guarantee the debt; in an action against the third person, it was objected that there was no sufficient consideration for his promise; the Court of Common Pleas, however, decided that there was. In another case the plaintiff had obtained judgment against Elizabeth Mackenzie for £57 debt, and 65s. costs; and, in consideration that the plaintiff would forbear to execute a *fiery facias* on her goods, the defendant undertook to pay him £107 in three days. It was objected, that there was no consideration, or, at least, no sufficient consideration: but Lord *Tenterden* said, "It is true the plaintiff might not perhaps have been entitled to recover to the

(b) *Willatts v. Kennedy*, 8 Bing. (21 E. C. L. R.) 5; *Parker v. Leigh*, 2 Stark. (3 E. C. L. R.) 229; *Atkinson v. Bayntun*, 1 Bing. N. C. (27 E. C. L. R.) 444.

full extent of £107, though, it is to be observed, he might have levied the cost of the execution in addition to the sum given by the verdict. But he had a right at least to levy £60; and if, in consideration of his forbearing that, the defendant promised to pay him the larger sum;—if the inconvenience of an execution against these goods at the time in question was so great, that the defendant thought proper to buy it off at such an expense, I do not see that the consideration is insufficient for the promise" (c)¹

(c) *Smith v. Algar*, 1 B. & Ad. (20 E. C. L. R.) 603.

¹ Forbearance to sue or proceed, has always been held a sufficient consideration: *Hamaker v. Eberly*, 2 Binn. 506; *Johns v. Potter*, 5 S. & R. 519; *Lonsdale v. Brown*, 4 Wash. C. C. 148; *Clark v. Russell*, 3 Watts 213; *Downing v. Funk*, 5 Rawle, 69; *Silvis v. Ely*, 3 W. & S. 420; *Kean v. M'Kinsey*, 2 Pa. St. 30; *Dundas v. Sterling*, 4 Ib. 73. But if the creditor has not the legal right to sue, at any time during which he promises to forbear suit, the promise to pay in consideration of such forbearance is without consideration, and consequently void: *Martin v. Black*, 20 Ala. 309. In *Caldwell v. Heitshu*, 9 W. & S. 51, the term "further forbearance," as the consideration expressed in a written guarantee, was construed to mean forbearance, for a convenient or reasonable time, taking into view in its computation as an element the period which had heretofore been permitted to elapse, without enforcing payment; and what is a reasonable or convenient time, the Court must determine. Forbearance to sue a debt due and payable, upon receiving a personal promise of payment from the assignee *in pais* of the debtor, is evidence from which a jury may infer an agreement to forbear which is a good consideration for the promise: *Boyd v. Freize*, 5 Gray, 553. In order to constitute a valid contract of forbearance of suit, it is necessary that it should be definite and certain as to the terms of forbearance and the period of it: *Garnett v. Kirkman*, 33 Miss. 389. The promise of A. to pay the debt of B. in consideration of forbearance is not binding, unless accepted by the promisee. To make it binding both must be bound: *Shupe v. Galbraith*, 32 Pa. St. 10. A promise in consideration of forbearance to pay the debt of an infant, who ratifies the contract after arriving at full age, is valid and binding on the promisor: *Kuns v. Young*, 34 Ib. 60. If the promisee perform the thing required, though not bound by the agreement to do it, the performance is a consideration and the promisor is bound: *Crawford v. Avery*, 35 Miss. 205. A promise to pay money in consideration of forbearance to sue when there is no legal cause of action is void: *Palfrey v. Portland R. R. Co.*, 4 Allen, 55. See also *Steadman v. Guthrie*, 4 Metc. (Ky.) 147; *McCelvy v. Noble*, 13 Rich. 330; *Sharpe v. Rogers*, 12 Minn. 174; *Mechanics' Bank v. Wixson*, 42 N. Y. 438.—s.

And where a man who has a judgment debt [*186] *takes from his debtor a promissory note for the amount, payable at a certain future time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that time, and if so, that is a good consideration for the giving of the note (*d*).

Although a man has not a clear legal or equitable right, yet if his right or claim is doubtful, and not clearly nugatory or illegal, the abandonment, or, for the

(*d*) *Belshaw v. Bush*, 29 L. J. (C. P) 24; *Baker v. Walker*, 14 M. & W. 465. See *Tempson v. Knowles*, 7 C. B. (62 E. C. L. R.) 651; *Wilson v. Bevan*, 7 C. B. (62 E. C. L. R.) 673.

Mere forbearance to sue without any agreement to that effect, is not a sufficient consideration for the promise of another to pay the debt of the person liable, although the act of forbearance was induced by such promise: *Manter v. Churchill*, 127 Mass. 31. Forbearance to contest a will is a good consideration, and a note given after the statutory period for contesting wills is good, if in pursuance of an agreement for settlement made within such period: *Hindert v. Schneider*, 4 Ill. App. 203. Where a tax collector, in consideration of the promise of the owner of land advertised to be sold for taxes, delays the sale beyond the advertised time, a sufficient consideration for the promise is given, and this without regard to the belief of the collector in the validity and regularity of the assessment: *Gove v. Newton*, 58 N. H. 359. A promise to pay money for the discontinuance of a suit is upon a sufficient consideration, though the defendant might have prevailed in the suit: *Flannagan v. Kilcome*, 58 N. H. 443. An agreement to forbear bringing suit for a debt due for an indefinite time, if followed by actual forbearance for a reasonable time, is a good consideration for a promise to pay the debt by a person other than the debtor: *Howe v. Taggart*, 133 Mass. 284. The maker of a note, being sued thereon, agreed, in consideration of forbearance to sue, to pay compound interest thereon for the remainder of its term: *Held*, that there was sufficient consideration for the agreement: *Jasper County v. Tavis*, 76 Mo. 13. A promise to guarantee a debt already due, made in consideration of the forbearance of the creditor to attach the debtor's goods, is void when there was no valid ground of attachment: *Smith v. Easton*, 54 Md. 138. A promise by a creditor to forbear the institution of proceedings in bankruptcy against his debtor is not a sufficient consideration to support a promise by a third party to pay the debt, if, in fact, the creditor could not have sustained such proceedings, though he believed that he could have sustained them, and though the third party believed that forbearance to proceed would be advantageous and beneficial to himself: *Ecker v. McAllister*, 54 Md. 362.

same reason, the forbearance of an action brought to enforce it, is a sufficient consideration for a promise (*e*). Where the plaintiff's goods had been seized by the Excise, and he had afterwards entered into an agreement with the Commissioners of Excise, that all proceedings should be terminated, the goods delivered up to him, and a sum of money paid by him to the Commissioners, *Parke*, B., rests his judgment on the ground that this agreement of compromise honestly made, was for a consideration, and binding (*f*). Indeed the disputed claim may be wholly unfounded, and yet the compromise of, or forbearance to enforce the claim may be a good consideration, if the claim be made *bona fide* at the time of the agreement to compromise or forbear (*g*).

[*187] *Thus, in *Cook v. Wright* (*h*), the trustees under a local Act called on the *agent* of the owner of certain houses to pay certain expenses chargeable under the act on the owner. The agent told the trustees that he was not owner but that B. was, and that such owner and not *he* was liable; but the trustees notwithstanding, really believing that he was liable, threatened to take proceedings against him. Thereupon the agent, although he knew he was not liable, gave his own promissory notes to the trustees, on their agreeing to take less than the amount demanded, and

(*e*) *Longridge v. Dorville*, 5 B. & Ad. (7 E. C. L. R.) 117; *Stracy v. Bank of England*, 6 Bing. (19 E. C. L. R.) 754.

(*f*) *Atlee v. Backhouse*, 3 M. & W. 633.

(*g*) *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; 39 L. J. (Q. B.) 181. See, however, the remarks of *Brett*, L. J., on this case in *Ex parte Banner, in re Blythe*, 17 Ch. Div. 480, 490; 51 L. J. (Ch.) 300, 302. His Lordship there questions "whether, in order to support a compromise of an action, it is not necessary to show, not only that the plaintiff believed that he had a good cause of action, but that the circumstances did in fact raise some doubt whether there was or was not a good cause of action, and," he adds, "I venture to doubt whether, if there was clearly and obviously no cause of action, the mere belief of the parties that there was would support the compromise."

(*h*) 1 B. & S. (101 E. C. L. R.) 559; 30 L. J. (Q. B.) 321.

allowing it to be paid by instalments, and this was decided to be a good consideration. *A fortiori*, where the right is not doubtful, but the amount of the claim only is disputed, an agreement for the settlement of all disputes upon the payment of a definite but smaller sum than that claimed, is held to be founded upon sufficient consideration (*i*)¹. But it would be another *matter if a person made a claim which he knew to be unfounded. Thus (*k*), where issue had been joined in a previous action for the recovery of a sum of money from the defendant, who had thereupon promised to pay the money and costs, in consideration

(*i*) *Edwards v. Baugh*, 11 M. & W. 641; *Wilkinson v. Byers*, 1 A. & E. (28 E. C. L. R.) 106; *Llewellyn v. Llewellyn*, 3 D. & L. 318.

(*k*) *Wade v. Simeon*, 2 C. B. (52 E. C. L. R.) 543, and see *Callisher v. Bischoffsheim*, *supra*.

¹ "A compromise of a doubtful title, when procured without such deceit as would vitiate any other contract, concludes the parties, though ignorant of the extent of their rights." *Gibson, C. J.*, in *Hoge v. Hoge*, 1 Watts, 216; *Brown v. Sloan*, 6 Watts, 421; *Meanor v. M'Kowan*, 4 W. & S. 304; *Rinehart v. Olwine*, 5 Ib. 163; *M'Culloch v. Cowher*, Ib. 417; *Chamberlain v. M'Clurg*, 8 Ib. 37; *Logan v. Matthews*, 6 Pa. St. 417. Even when there was a mutual mistake of the law, the parties having acted in good faith, a compromise has been supported: *M'Coy v. Hutchinson*, 8 W. & S. 66. The compromise of an action of slander, in which the words laid in the declaration were not actionable, was held a good consideration: *O'Keson v. Barclay*, 2 P. & W. 531. That the claim was evidently without color would be a circumstance to show fraud or imposition upon a weak understanding, but if a man with his faculties about him, makes a promise to get rid of an annoying claim, which, though worthless, it will cost him time, trouble, and money to contest, it would be drawing the Court into too nice a discussion to determine what degree of doubt there must be about it to give validity to the compromise. A compromise of conflicting and doubtful claims or the giving up a suit instituted to try a question respecting which the law is doubtful, is a sufficient consideration to support an agreement to pay a stipulated sum: *Field v. Weir*, 28 Miss. 56; *Burnham v. Dunn*, 35 N. H. 556; *Mayo v. Gardner*, 4 Jones, 359; *Jarvis v. Sutton*, 3 Ind. 289; *Kerr v. Lucas*, 1 Allen, 279; *Allen v. Prater*, 35 Ala. 169; *Crans v. Hunter*, 28 N. Y. 389. An agreement to settle a family controversy cannot be considered a nude pact: *Watkins v. Watkins*, 24 Ga. 402. Where a claim is legally groundless a promise upon a compromise of it or of a suit upon it, is not binding: *Schnell v. Nell*, 17 Ind. 29. See also *Crans v. Hunter*, 28 N. Y. 389; *Fleming v. Ramsey*, 46 Pa. St. 252; *Farmers' Bank v. Blair*, 44 Barb. 641; *Scott v. Warner*, 2 Lans. 49; *Snow v. Grace* 29 Ark. 131.—s.

that the plaintiff would forbear further proceedings; an action having been brought upon this promise, the defendant pleaded that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the said action. "To that," said *Tindal*, C. J., in giving judgment, "the plaintiff has demurred, and, doing so, admits the statement contained in it, that he had no cause of action in the original suit, to be true. Having made that admission, it appears to me that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost *contra bonos mores*, and certainly against all legal principle, that when a man knows that he has no cause for it, he should still persist in prosecuting an action. Then, in order to establish a binding promise, the plaintiff must show a consideration for it, consisting of something which is either beneficial to the defendant or detrimental to the plaintiff. It cannot, however, be said that the foregoing of such an action can be regarded by a Court as beneficial to the defendant, because [*189] he *thereby saves the risk of defeat, and the extra costs which he would necessarily incur in his defence; for we must assume that the result of the action would have been in his favour, and the law would enable him to recover costs, which it regards as a compensation for all the costs the defendant sustains. Neither can the foregoing of the action be regarded as detrimental to the plaintiff, for we can only view it as saving him from the payment of those costs. The consideration, therefore, fails upon both grounds."

Again it has been decided, that, if I *entrust* a man to do some act for me, although I am to pay him nothing for performing it, still the mere *trust* which I repose in him is a consideration for a promise on his part to conduct himself faithfully in the performance of

it (*l*). Nay, so far do the cases on this subject go, that it is settled that not only is the reposal of such trust a sufficient consideration for an express promise on the part of the person in whom it is reposed to conduct himself faithfully in the performance of it; but the law, even in the absence of an express promise, implies one that he will not be guilty of gross negligence. This was the point decided in the famous case of *Coggs v. Bernard* (*m*).

*In this case Bernard had undertaken safely [*190] and securely to take up several hogsheads of brandy from one cellar, and safely and securely to lay them down again in another; and he was held bound by that undertaking, and responsible for damage sustained by them in the removal. The reason is, said Mr. Justice *Gould*, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in executing which he has miscarried by his neglect. If goods are deposited with a friend, and are stolen from him no action will lie. But there will be a difference in that case upon the evidence how the matter appears. If they are stolen by reason of a gross neglect in the bailee, the trust will not save him from an action; otherwise, if there be no gross neglect. But, if a man takes upon him expressly to do such an act safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him.

And on this point of the law it is that the celebrated distinction occurs between remunerated and unremunerated agents; from the former of whom the law implies a promise, that they will act with reasonable diligence;

(*l*) See *Whitehead v. Greetham*, 2 Bing. (9 E. C. L. R.) 464; *Shillibeer v. Glynn*, 2 M. & W. 143; *Bainbridge v. Firmstone*, *ante*, p. *178.

(*m*) 2 Ld. Raym. 909; 1 Smith, L. C. 199 (8th ed.). See *Gladwell v. Stegall*, 5 Bing. N. C. (35 E. C. L. R.) 733; *Blackmore v. Bristol and Exeter Railway*, 27 L. J. (Q. B.) 167; 8 E. & B. (92 E. C. L. R.) 1035.

from the latter, only that they will not be guilty of gross negligence. Thus, where a stage-coachman received a parcel to carry *gratis*, and it was lost upon the road, Lord **Tenterden* directed the jury to consider whether there was great negligence on the coachman's part (*n*). And where the declaration stated that, in consideration that the plaintiff, at the defendant's request, would employ him to lay out £1400 on the purchase of an annuity, the defendant promised to perform his duty in the premises, yet did not do so, but laid it out in the purchase of an annuity on the personal security of insolvent persons, the Court arrested the judgment, on the ground that the defendant was an unremunerated agent, and was not charged with having acted negligently or dishonestly (*o*). There is another equally remarkable distinction, namely, that a remunerated agent may be compelled to enter upon the performance of his trust, or at least made liable in damages if he neglect to do so; whereas an unremunerated agent cannot, although, as we have seen, he *may* be liable for misconduct in the performance of it. This proposition is well illustrated in the case of *Elsee v. Gatward* (*p*), where one count of the declaration, stating that the plaintiff retained the defendant, a carpenter, to repair a house before a given day, that the defendant accepted the retainer, but did not perform the work within the time, whereby the walls of

[*192] *the plaintiff's house were damaged, was held to be insufficient as not showing any consideration; but another count, stating that the plaintiff, being possessed of some old materials, retained the defendant

(*n*) *Beauchamp v. Powley*, 1 M. & Rob. 38. See, as to the meaning of gross negligence, *Beal v. S. Devon Rail. Co.*, 3 H & C. 336.

(*o*) *Dartnall v. Howard*, 4 B. & C. (10 E. C. L. R.) 345; *Doorman v. Jenkins*, 2 A. & E. (29 E. C. L. R.) 256.

(*p*) 5 T. R. 143.

to perform the carpenter's work on certain buildings of the plaintiff, and to use those old materials, but that the defendant, instead of using them, made use of new ones, thereby increasing the expense, was held good, as it appeared that the defendant had entered on the performance of the work.

Again, if one man is compelled to do that which another man ought to have done and was compellable to do, that is a sufficient consideration to support a promise by the former to indemnify him. Such is the common case of a surety who has been compelled to pay a demand made against the principal, and who, as we know, is entitled to bring an action to recover an indemnity. And such is also the case of an endorser of a bill, who, on account of the acceptor's default in not paying the bill when due, is compelled by the holder to pay him the amount; the endorser may sue the acceptor to recover an indemnity (*q*). In like manner, if one of several joint contractors, not being partners (whose rights *inter se* are not at common law ever decided), has been compelled to pay, or in pursuance of his legal obligation has paid, the whole of their common liability, he is entitled to recover from each *of them his proportional share (*r*). An instructive exam- [*193] ple of the same rule is afforded by the case of *Sutton v. Tatham* (*s*). There, the broker for a seller having entered into a contract for the sale of stock, which was

(*q*) *Pownall v. Ferrand*, 6 B. & C. (13 E. C. L. R.) 439. See also 45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882), s. 57.

(*r*) *Holmes v. Williamson*, 6 M. & S. 158; *Prior v. Hembrow*, 8 M. & W. 873; *Pitt v. Purssord*, 8 M. & W. 538; *Batard v. Hawes*, 22 L. J. (Q. B.) 443; 2 E. & B. (75 E. C. L. R.) 287.

(*s*) 10 A. & E. (37 E. C. L. R.) 27; *Pawle v. Gunn*, 4 Bing. N. C. (33 E. C. L. R.) 445; *Bayliffe v. Butterworth*, 1 Ex. 425; *Bayley v. Wilkins*, 7 C. B. (62 E. C. L. R.) 886; *Westrop v. Solomon*, 8 C. B. (65 E. C. L. R.) 345; *Taylor v. Stray*, 26 L. J. (C. P.) 185, 287 (Ex. Ch.); 2 C. B. (N. S.) (89 E. C. L. R.) 175, 197.

not fulfilled by his principal, and similar stock having been thereupon purchased at a higher price by the broker of the purchaser, the seller's broker, in obedience to a rule of the Stock Exchange, paid the difference, and also the commission of the purchaser's broker; and it was held that the seller's broker might recover from his principal the amount of such payments, by showing that it was compulsory upon him to make them. These examples seem sufficient to explain the nature of the species of consideration now before us (*t*).

I might cite a multitude of other cases in which questions have arisen as to the sufficiency of the consideration; but I think that the instances I have already given are sufficient for the purpose I had in view, which was, to illustrate the general nature of the questions which arise on the sufficiency of a *consideration* to support a promise.

[*194] *There is, however, one thing more to be observed, and that is the distinction between *executed* and *executory* considerations. Now, with regard to the meaning of these words, which you will continually hear used in legal arguments, it is this:—an *executed consideration* is one which has *already taken place*, an *executory consideration* one which *is to take place*—one is *past*, the other *future*. Thus, if A. delivered goods to B. yesterday, and B. makes a promise to-day in consideration of that delivery, this promise is said to be founded upon an *executed* consideration, because the delivery of the goods is past and over. But, if it be agreed that A. *shall* deliver goods to B. to-morrow, and that B. shall, in consideration, do something for A., here is an *executory consideration*, because the delivery of the goods has not yet taken place. And so, whenever,

(*t*) *Toussaint v. Martinnant*, 2 T. R. 100; *Fisher v. Fallowes*, 5 Esp. 171; *Jeffreys v. Gurr*, 2 B. & Ad. (22 E. C. L. R.) 833.

at the time of making a promise, the consideration on which it is founded is *past*, the consideration is said to be *executed*; whenever the consideration is future, it is said to be *executory*.¹

Now, between *executed* and *executory*, or, in other words, between *past* and *future* considerations, the law makes this distinction, namely, that an *executed* consideration must be founded on a previous request; an

¹There are also said to be two other kinds of consideration, viz., concurring and continuing. The former arises in the case of mutual promises, as where A. and B. being competitors for the bounty for the best manufactured cloth, agreed that the successful competitor should divide the bounty with the other, the promises were mutual, and in consideration of each other: *Briggs v. Tillotson*, 8 Johns. 306. So when several promise to contribute to a common object: *Stewart v. Trustees of Hamilton College*, 2 Den. 403; *Society of Troy v. Perry*, 6 N. H. 164; where one promises to become a partner, and the other promises to receive him as such: *M'Neill v. Reid*, 9 Bing. (23 E. C. L. R.) 68, and the like; *Wood v. Rice*, 481; *Wightman v. Coates*, 15 Mass. 1; *Willard v. Stone*, 7 Cow. 22. In cases of concurrent considerations, if the promise of either party should fail to bind him (as from illegality of subject-matter, or any such cause), the other promise will be deprived of its support, and the contract could not be enforced. It is also necessary that the promises should be mutual and simultaneous: *Thornton v. Jenyns*, 1 Scott, 74; and an averment that, in consideration of the plaintiff's promise, the defendant "*afterwards, to wit, on the same day, promised*," has been held bad, the promise having no consideration; that is, no consideration but another promise, and that promise was not a mutual and simultaneous one: *Livingston v. Rogers*, 1 Cai. 583; *Fricke v. Wood*, 12 Johns. 190; *Keep v. Goodrich*, *Ib.* 397.

It has been sometimes said that a *continuing* consideration is sufficient to support a promise, as where one should promise in consideration of what the other party had done and might thereafter do. But, in reality, it is the executory part of the consideration which is alone valuable, and is sufficient to support the whole promise; and such, upon examination, will, it is believed, be found to be the true ground of decision of the cases: *Pearl v. Unge*, Cro. Eliz. 94; *Brett v. J. S.*, Cro. Eliz. 735; *Colton v. Westcott*, 1 Rolle, 381; *Loomis v. Newhall*, 15 Pick. 159; *Andrews v. Ives*, 3 Conn. 368.—R.

Mutual promises constitute a sufficient consideration for the support of a contract: *Forney v. Shipp*, 4 Jones, 527; *Nott v. Johnson*, 7 Ohio St. 270; *Leach v. Keech*, 7 Clarke, 232; *Aldrich v. Lyman*, 6 R. I. 98; *Funk v. Hough*, 29 Ill. 145; *Briggs v. Sizer*, 30 N. Y. 647; *Downey v. Hinchman*, 25 Ind. 453; *Boies v. Vincent*, 24 Iowa, 387; *Messesquor v. Sabin*, 48 Vt. 239. And see as to subscriptions: *Underwood v. Waldson*, 12 Mich. 73; *Van Rensselaar v. Aiken*, 44 Barb. 547; *Pitt v. Gentle*, 49 Mo. 74; *Cooper v. M'Crimmin*, 33 Tex. 383; *Lathrop v. Knapp*, 27 Wis. 214.—S.

executory one need not, or, to speak more correctly, its very terms imply a request. For, if A. promise to remunerate B. in consideration that B. will perform something specified, that amounts to a request to B. to perform the act for which he is *to be remunerated (u). For instance, in the case of *Hunt v. Bate* (x), Bate's servant was arrested and sent to prison, and Hunt became bail for him, and procured his liberation, after which the master promised Hunt to save him harmless. Hunt was obliged to pay the servant's debt, and brought an action against Bate upon his promise to indemnify him; but the Court held that it would not lie. "For," said the Judges, "the master did never make *request* to the plaintiff to do so much, but he did it of his own head." But the report goes on to say, "in another action brought on a promise of twenty pounds made to the plaintiff by the defendant, in consideration that the plaintiff," *at the special instance of the defendant*, had taken to wife the cousin of the defendant, that was a "good cause of action, though the marriage was *executed* and *past* before the undertaking and promise, because the marriage ensued at the *request* of the defendant."¹

(u) 1 Smith, L. C. 155, note, 8th ed.

(x) Dyer, 272; *Pourtales Gorgier v. Morris*, 29 L. J. (C. P.) 208.

¹A very good illustration of this principle may be found in the case of *Dearborn v. Bowman*, 3 Metc. 155, where the plaintiff had in a political campaign rendered services in the circulation of pamphlets to aid the election of the defendant, who had subsequently promised to pay him therefor, and the Court, in holding the promise to be destitute of consideration, said, "Such services impose no obligation, legal or moral, on the defendant, and it would be somewhat dangerous to hold that they created any honorary obligation on him to pay for them. Nor would it be aided in a legal view by a previous custom, if proved, for candidates to contribute to the payment of similar expenses, whether successful or otherwise in the election. Nor were these services performed at the request of the defendant. On the contrary, it appeared by the evidence that they were performed by the chairman of the

These two cases clearly illustrate the distinction between an *executed* consideration *moved* by a previous request, which will support a promise, and an executed consideration not moved by a previous request which will not support a promise.¹ You will find the same

county committee, who alone was responsible for the payment, and between whom and the defendant there was no privity, nor even any communication, until long after the services had been performed. The rule of law seems to be now well settled, though it may have been formerly left in doubt, that the past performance of service constitutes no consideration even for an express promise, unless they were performed at the express or implied request of the defendant, or unless they were done in performance of some duty or obligation resting on the defendant: *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Ib. 159; *Dodge v. Adams*, 19 Ib. 429. As the services performed by the plaintiff were not done at the request of the defendant, as they were not done in the fulfilment of any duty or obligation resting on him, there was no consideration to convert the express promise of the defendant into a legal obligation." To the same point are *Snevily v. Read*, 9 Watts, 396; *Geer v. Archer*, 2 Barb. 420; *Hudson v. Overtuff*, 2 Ill. 170; *Kinnerly v. Martin*, 8 Mo. 698; *Beaumont v. Reeve*, 8 Q. B. (55 E. C. L. R.) 483.—R.

¹ This statement should be somewhat qualified. It has already been pointed out that a consideration is some detriment suffered by the promisee in reliance upon the promise of the promisor. Now if the consideration be executed (that is, past) at the time the promise is made, it is obvious that the promisee did not afford this consideration upon the faith of the promise, for he could not know that such a promise would ever be made, and it is equally obvious that the promisor received nothing in return for his promise, either when he made it or at any other time—that which he received from the promisee he had already obtained, and in regard to it his position would never be altered if he never made any promise at all.

Is the case altered if the consideration moved at the request of the promisor? If I request some one to perform some service for me, in no way implying that I expect to compensate him for it, and he does it, and I subsequently thank him for the service rendered and promise that because of it I will do something for him, will this promise bind me? If the language quoted from *Lampleigh v. Braithwaite* be a correct statement of the law, it will, and I shall be held to the performance of a promise in return for which I received nothing, and which was entirely voluntary on my part. But upon this point *Lampleigh v. Braithwaite* and similar cases must be regarded as overruled: *Langdell, Cases on Contracts*, ii, 1035 *et seq.* An obligation sometimes arises from a past transaction, but this is where the obligation is imposed by the law, and although it is known as an implied *contract*, the agreement of the parties has nothing to do with its binding force: *infra*, pp. *197 *et seq.* Accordingly it is held that when the law implies a promise from such a transaction—such an executed consideration, as it is called—no different promise, no matter how clearly expressed, can be enforced: *infra*, p. *206.

[*196] distinction clearly explained in *Lampleigh v. Braithwaite (*y*), where the Court said, "a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party who gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference." In a modern case this principle was applied where the question was, as to whether there had been any consideration given for a Promissory Note. A., the plaintiff, having performed gratuitously services for B., received from him a promissory note, with an understanding that he should not only accept it as a gift for what was past, but that it should be a remuneration for future services to be rendered as long as B. should require them. A. continued to perform the services until B.'s death, when he sued B.'s executor's upon the note. It was held, that in order to make the future services a good consideration for giving the note, it was incumbent on the plaintiff to show that there was some *contract* binding him to perform future services which might have been enforced by the giver of the note, and that a mere *understanding* was not a suffi-

(*y*) Hob. 105. See judgment in *Eastwood v. Kenyon*, 11 A. & E. (39 E. C. L. R.) 438.

The modern rule appears to be that where the obligation is created by the law it makes no difference whether the party bound requested the performance of the so-called consideration or not. In other cases where the party is bound because of his previous request, it would seem to be because the request was in such terms as to imply compensation for the services rendered, and here the action rests upon the promise implied in the request at the time of the services rendered, and is independent of any subsequent express promise on his part.

See *Turner v. Partridge*, 3 P. & W. 172; *Kenan v. Holloway*, 18 Ala. 53; *Ayers v. Chicago, &c., R. R.*, 52 Iowa, 478; *Langdell*, Summary of the Law of Contracts, §§ 90-98; *Wharton on Contracts*, § 514.

cient consideration, there being nothing to show that the plaintiff might not, the *moment the note was given, have refused to give his services (z).¹ [*197]

But here arises another distinction, and it is the last to which I shall refer upon this subject; but this is a distinction to which it is absolutely necessary to refer, in order that you may not be misled by what I have already stated. There being the rule I have just stated regarding *executed considerations*, namely, that an *executed consideration* must have arisen from a previous request by the person promising, in order that it may be sufficient to support the *promise*, there are certain classes of cases in which this *previous request* is *implied*, and need not be expressly proved by the person to whom the promise is given. Now the cases in which a previous request is implied are as follows.

First, the case which I have already stated, *in which one man is compelled to do that which another ought to have done, and was compellable to do*. In this case the consideration is an *executed* one, for the thing must have been *done* before any promise can be made to reimburse the person who has done it; but though the consideration is *executed* the law implies the request. And therefore in this case an action may be brought for indemnity without proving any express request on the part of the *defendant (a). In addition to the examples already given, the case of *Exall v. Partridge* (b) is well calculated to set this matter in a [*198]

(z) *Hulse v. Hulse*, 17 C. B. (84 E. C. L. R.) 711; 25 L. J. (C. P.) 177.

(a) See judgment of Queen's Bench in *Batard v. Hawes*, 22 L. J. (Q. B.) 443; 2 E. & B. (75 E. C. L. R.) 287.

(b) 8 T. R. 308. See also *Johnson v. Royal Mail Steam Packet Co.*, L. R.

¹ The student who seeks for a more extended analysis of this subject than can be afforded in these elementary lectures, may most profitably refer to the note to *Lampleigh v. Brathwaite*, 1 Smith's L. C. 268, 8th Am. Ed., and that to *Vadakin v. Soper*, 1 Am. L. C. 120.—R.

clear light. There the defendant was tenant of certain premises, and under covenant to pay rent to the landlord for them. Having neglected to pay the rent, the goods of a stranger to the contract between the landlord and tenant, which were upon the premises of the latter, were distrained by the landlord for the rent in arrear, and it was held that the stranger might sue the tenant for the money which he had paid in order to redeem his goods; although it is obvious, from the state of the facts, that no request that he should do so had in fact been made by the tenant. In *Grissell v. Robinson* (c), the plaintiff had contracted to grant the defendant a lease; the lease was prepared by their solicitor and [*199] executed. It is the general *practice for the lessor's solicitor to prepare the lease, and for the lessee to pay the solicitor; the lessee having refused so to do, the lessors paid him, as they might have been compelled to do; and the Court decided that an action was maintainable by them for money paid at the lessee's request.

I must further observe upon this class of cases, and also upon the next, that, not only is the request implied, but the *promise* also; for, if, to put an example, A. is indebted to B. in a certain sum of money, and C. is his surety; if C. be compelled to pay, not only is a request by A. to do so implied by law, but a promise by him to indemnify C. is also implied. And, in an action

3 C. P. 38; 37 L. J. (C. P.) 33. In *Exall v. Partridge*, the goods distrained on were on the premises at the request of the tenant. When a stranger leaves his goods on the premises without any request, express or implied, of the tenant, and the stranger's goods are distrained, he cannot recover what he pays to release them from the tenant, as for money paid: *England v. Marsden*, L. R. 1 C. P. 529; 35 L. J. (C. P.) 259.

(c) 3 Bing. N. C. (32 E. C. L. R.) 10; *Webb v. Rhodes*, 3 Bing. N. C. (32 E. C. L. R.) 732; *Moon v. Guardians of Witney Union*, 3 Bing. N. C. (32 E. C. L. R.) 814; *Wilkinson v. Grant*, 25 L. J. (C. P.) 233; 18 C. B. (36 E. C. L. R.) 319; *Smith v. Clegg*, 27 L. J. (Ex.) 300.

brought by C. to enforce the indemnity, he need prove no express promise, no express request, but simply that A. was indebted to B., and that he, C., as A.'s surety, was compelled to pay that debt (*d*). For an example of this, you may take the common case of an accommodation acceptor or endorser, who, as soon as he has been obliged to pay the money, may maintain an action against the person for whose accommodation he accepted or endorsed (*e*).¹

Secondly, where the person who is sought to be charged *adopts* and *takes advantage of the benefit* *of the consideration. Suppose, for instance, A. purchases goods for B. without his sanction, B. [*200] may, if he think fit, repudiate the whole transaction; but if, instead of doing so, he receive the goods and take possession of them, the law will imply a request from him to A. to purchase them, and will also imply a promise by him to repay A., and he will be liable in an

(*d*) *Pawle v. Gunn*, 4 Bing. N. C. (63 E. C. L. R.) 445; *Jones v. Orchard*, 24 L. J. (C. P.) 229; 16 C. B. (81 E. C. L. R.) 614.

(*e*) *Driver v. Burton*, 21 L. J. (Q. B.) 157; 17 Q. B. (79 E. C. L. R.) 989.

¹ This principle is well illustrated by the case of *Draughan v. Bunting*, 9 Ired. 13, where the plaintiff, who had endorsed and been compelled to pay a promissory note, relied in an action against a prior endorser, on a parol promise of indemnity given to him by the maker at the time of the endorsement. The court held it clear that the action could not be sustained on the parol promise, because being one "to answer for the debt or the default of another," it came within the Statute of Frauds, and should therefore be in writing, but that the law implied a promise to indemnify from the relation of suretyship, upon which the plaintiff might have recovered, but for the following circumstance: the plaintiff, in order to prove this parol promise, had called the maker of the note as a witness, and had been obliged to execute a release to him, in order to restore his competency, and it was urged that this release to the principal discharged the surety, which was undoubtedly correct, as the Court held: but it being also in evidence that the defendant had acknowledged the receipt of funds from the maker, wherewith to discharge the debt, it was held that a promise was implied thus to apply the money, and the plaintiff was held entitled to recover upon his count for money paid.—R.

action for money paid to his use, founded on that implied promise (*f*). The cases where goods have been supplied to children without the knowledge or express request of the father, are illustrations of this rule. Even where the goods supplied are necessaries, some recognition amounting to adoption is requisite, in order to render the father liable, and to support the implied request and promise; in such case it has often been considered sufficient that the father should have seen them worn by the child without objection (*g*). See 1 Wms. Saund. 264, note 1, where you may, if you please, find a great deal of valuable information upon the whole subject of which I am now treating.¹ It is obvious that the same rule will apply where one man does work for another without his request, as when he purchases or supplies goods for him. But suppose such a case as this: I do valuable work on your property without your [*201] *knowledge, have I a claim on you for payment? “How can you help it? One cleans another’s shoes, what can the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself.” Adoption, and taking advantage of the benefit of the consideration may be such recognition or acceptance of services as may be sufficient to show an implied contract to pay for them, if, at the time, the defendant had power to accept or refuse it.

(*f*) See *Coles v. Bulman*, 6 C. B. (60 E. C. L. R.) 184.

(*g*) *Law v. Wilkin*, 6 A. & E. (33 E. C. L. R.) 718. See *Mortimore v. Wright*, 6 M. & W. 482; *Linnegar v. Hodd*, 5 C. B. (57 E. C. L. R.) 437.

¹ Instances of the application of this rule will be found in *Pawle v. Gunn*, 4 Bing. N. C. (33 E. C. L. R.) 445; *Derby v. Wilson*, 14 Johns. 378; *Rowntree v. Holloway*, 13 Ala. 357; *Kenan v. Holloway*, 16 Ib. 58; *Guerard v. Jenkins*, 1 Strob. 171.—R.

Without such power, acceptance of the service is no evidence of a promise to pay for it (*h*).¹

The *third* case, in which a request is implied, is that in which a person does, without compulsion, that which the person sought to be charged was compellable by law to do. Suppose, for instance, A. owes B. £50, and C. pays it: now here, if A. promise to repay C., it will be implied that the payment by C. was made at his request (*i*). But, in this class of cases, you will observe, though the request is implied where there is a promise, yet the promise must be *express*, for the law will not imply one, as in the two last cases (*k*): thus, if A. is B.'s *surety, and is forced to pay his debt, the law [*202] implies a request to pay it, and a promise to repay. If he be not B.'s surety, but pays it of his own accord, the law implies neither promise nor request, for a man cannot make me his debtor by paying money for me against my will.² Yet, even in this case, if B. *expressly* promise to repay it, a request by him to pay it is implied, for it is a maxim

(*h*) *Taylor v. Laird*, 25 L. J. (Ex.) 332, Pollock, C. B.; *Boulton v. Jones*, 27 L. J. (Ex.) 117. See *British Empire Shipping Company v. James*, 27 L. J. (Q. B.) 397; confirmed in House of Lords, 30 L. J. (Q. B.) 229.

(*i*) *Wing v. Mill*, 1 B. & Ald. 104.

(*k*) *Atkins v. Banwell*, 2 East, 505; *Rex v. Oldland*, 4 A. & E. (31 E. C. L. R.) 929.

¹ Implied contract to pay for services may be rebutted by proof of relationship: *Smith v. Milligan*, 43 Pa. St. 107; *Duffey v. Duffey*, 44 Ib. 399; *Hartman's Appeal*, 3 Grant, 271; *Amey's Appeal*, 49 Pa. St. 126; *Butler v. Slam*, 50 Ib. 456; *Daubenspeck v. Powers*, 32 Ind. 42. It is a general rule that when a child continues with the parent after coming of age no express contract for wages being shown, the presumption is that no wages are to be paid, but this presumption may be rebutted: *Adams v. Adams' Adm'rs*, 23 Ind. 190; *Hart v. Hess*, 41 Mo. 441.—s.

² *Durnford v. Messiter*, 5 M. & S. 445; *Weakly v. Braham*, 2 Stew. 500; *Keenan v. Holloway*, *supra*; *Lewis v. Lewis*, 3 Strobb. 532; *Mathews v. Colborne*, 1 Ib. 258; *Young v. Dribbell*, 7 Humph. 270.—r.

that *omnis ratihabitio retrotrahitur et mandato æquiparatur*.¹

In the three cases I have just put, the law *implies* a request, on the part of the person sought to be charged, to do that which is relied on as the consideration for the promise upon which it is sought to charge him.²

¹ Windsor v. Savage, 9 Metc. 348; Lewis v. Lewis, 3 Strobbh. 530; 1 Saund. 264, n.—R.

A voluntary payment of money by one person for the use of another without a previous request, will not support a subsequent promise to refund, unless the payment is beneficial to the promisor: Kenan v. Holloway, 16 Ala. 53. See Turner v. Partridge, 3 P. & W. 172.

² The salutary legal principle which lies at the bottom of all the cases upon this subject is, that every legal liability must spring from something *actually done*, and not from something *merely said*. From this, it is easy to perceive how it is, that from certain acts the law will imply a promise, which shall be so highly regarded that an express promise shall not be allowed to vary it (Hopkins v. Logan, &c., *infra*), and while at the same time it will disregard the most solemn verbal undertaking that does not spring from some actual transaction. Hence it is, that a warranty *after* a sale cannot be enforced, unless something new be done at the time of giving the warranty, for the promise stands upon words and not upon acts: Roscorla v. Thomas, *infra*; Hogins v. Plympton, 11. Pick. 97; Williams v. Hathaway, 19 Pick. 387; Bloas v. Kittridge, 5 Vt. 28. In like manner, an undertaking by a landlord for his tenant's quiet enjoyment, is, when made after the contract of tenancy has been entered into, wholly ineffectual for any purpose: Granger v. Collins, 6 M. & W. 458. So, after a bargain has been made, a naked promise to pay more or take less than the contract price, is useless to the party receiving it: Geer v. Archer, 2 Barb. 420; Williams v. Hathaway, 19 Pick. 387. And the reason of these cases is obvious, from the danger which would arise if mere conversations, unsupported by acts, were allowed to go to a jury, as evidence from which they might mould them into contracts. Hence, too, arises an important class of cases, which determine that a precedent debt cannot, of itself, form a sufficient consideration for a promise, for such a debt arises from a contract already fulfilled, and therefore comes within the legal principle just stated: Hopkins v. Logan, 5 M. & W. 241; Vadakin v. Soper, 1 Aik. 287; Russell v. Buck, 11 Vt. 176; Barker v. Bucklin, 2 Den. 59; Railroad Co. v. Johnson, 7 W. & S. 317–328; Jackson v. Jackson, 7 Ala. 791; although, when such a promise is cotemporaneous with an *actual transaction*, such as a suspension, or an extinguishment of the precedent debt, the acquisition of an additional security for its payment, the commencement of a new course of dealing, or the like, it will be enforced by law, for it does not rest on mere words: Peate v. Dicken, 1 Cr., M. & R. 423; Wilson v. Coupland, 5 B. & Ald (7 E. C. L. R.) 228; Clark v. Sigourney, 17 Conn. 511; Phillips v. Bergen, 2 Barb. 608;

There is a fourth class of cases, in which the consideration relied on has been that one man has done for

Smith v. Weed, 20 Wend. 184; Weld v. Nichols, 17 Pick. 588; Taylor v. Meek, 4 Blackf. 388.

The sound reasons for what would at first appear to be a pertinacious adherence to a narrow rule, are thus expressed by Mr. Hare, after a review of the authorities, in the note to *Vadakin v. Soper*, 2 Am. L. C. "The general principle," said he, "which requires that every express contract shall be sustained by a cotemporaneous consideration, is, in effect, a rule of evidence of great importance, to the exclusion of fraud and misrepresentation from the tribunals of justice. If a mere verbal promise, without consideration, were sufficient to create a legal liability and sustain an action, no safety could be found against the misrepresentation of the most ordinary conversation, unless in the sagacity of the jury called to determine (perchance on a prejudice or false relation), whether it was meant or understood as a positive obligation for the payment of money, or the fulfilment of an engagement of any other description. And if a past consideration were sufficient to give such an engagement validity, the danger would be as great; for men, though but little disposed to promise further compensation for past services in their own case, are sufficiently ready to believe such an allegation in that of another, especially if supported by any plausible pretence, that the amount originally bargained for was insufficient. The chance of an erroneous verdict would be still greater in those instances, in which a bargain has resulted disadvantageously for one of the parties, and where he has induced the other to hold any language which can be construed or perverted into a promise of indemnification. The necessity for proving the existence of a cotemporaneous consideration, obviates this danger, by bringing the evidence back from words to things, which are not so easily susceptible of mistake or falsification. The uncertainty which results from looking to the subsequent language of a party, as the test of his liability, has been found so great in the cases arising under the Statute of Limitations, as to lead to the introduction, in England, and some parts of this country, of legislative enactments, making it necessary that the acknowledgment of the debt shall be in writing, and not be proved by mere verbal testimony. Yet in that case, the only effect of the evidence is to revive an anterior liability, of which the original existence is proved *abunde*, and it is therefore easy to imagine what would be the result if every transaction of human life were open to the interpretation which a witness or jury might choose to give to any subsequent conversation of which it is made the subject. It would, therefore, appear that the rules of the common law with respect to consideration, so far from deserving the reproach of narrowness and illiberality which has been sometimes cast upon them, are really founded upon a just appreciation of the uncertainty of testimony, and the exigencies of life, and should be sedulously upheld and applied, and not explained away or disregarded. It may safely be asserted that they do more to prevent fraud and perjury than any legislative enactment which has been, or can be devised for that purpose, and that if they had not been laid down and defined by judicial sagacity, it would be necessary to introduce them by legislative authority."

another something which that other, though not *legally*, is morally bound to do. In such cases it is clear, that, if there be no *express* promise to remunerate him, remuneration cannot be enforced. But it has been a great question, and has been frequently discussed, whether, even if there be an express promise, any request can be implied in order to support the consideration. On this question, which is but a branch of one which has been often the subject of anxious consideration, namely, in what cases a moral obligation is a sufficient consideration to support a promise, it is worth

[*203] while to read the cases cited in the *note (l). But it may be considered as now settled, that a merely moral consideration will not support a prom-

(l) *Lee v. Muggeridge*, 5 Taunt. (1 E. C. L. R.) 36; *Atkins v. Banwell*, 2 East, 505; and the note to *Wennall v. Adney*, 3 B. & P. 247.

It is necessary to distinguish the class of cases referred to, from those which decide that a promise to pay a debt barred by the Statutes of Bankruptcy or Limitation is based upon sufficient consideration. Some expressions in the cases would seem to conflict with the general principle just referred to, but in reality the grounds of the decision are in harmony. The promise of a debtor to pay a debt so barred, although it is often called a new promise, is in reality rather a *waiver* of the bar which the statute has interposed. In pleading, it is sufficient to count on the original debt, and when the statute is pleaded, the evidence offered under the replication of a new promise or acknowledgment within six years, forms no variance between the declaration and the proof, for whether the defendant is liable by reason of the original consideration for the debt, or by reason of his subsequent acknowledgment, is immaterial, provided the plaintiff prove the original consideration, and the liability at the time of suit brought, and if that liability arises from the new promise, it is just such a liability as the law implies from the old consideration, and hence the new promise accords with the old one, and there is no variance. This will be found fully explained in the note to *Whitcomb v. Whiting*, 1 Smith's L. C. 621, 8th Am. ed. But in the ordinary case of a precedent debt, a declaration setting forth that the plaintiff had contracted to build a wagon for \$100, and that having done so, the defendant, in consideration thereof, promised to pay him \$200, would be clearly bad, for such a promise would not be implied by law from the old consideration, which was the only one. So, in the case of an indebtedness to two persons jointly, a promise by the debtor, in consideration of the promise, to pay one-half of the debt to one of them, could not be enforced, for it is not such a promise as the law implies from the old consideration, and this was the case of *Vadakin v. Soper*, *supra*.—R.

ise (*m*). A mere moral consideration has been said by high authority to be *nothing* in law (*n*). "A subsequent express promise," said *Tindal*, C. J., "will not convert into a debt that which of itself was not a legal debt" (*o*). And the Court of Queen's Bench, in the case of *Eastwood v. Kenyon* (*p*), quotes with approval the conclusion arrived at in the note to *Wennall v. Adney* just cited, "that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, *had it not been suspended by some positive rule of law*; but can give no original cause of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision" (*q*).¹ This principle may be illus-

(*m*) *Monkman v. Shepherdson*, 11 A. & E. (39 E. C. L. R.) 415; *Beaumont v. Reeve*, 8 Q. B. (55 E. C. L. R.) 483. See *Hicks v. Gregory*, 8 C. B. (65 E. C. L. R.) 378.

(*n*) *Jennings v. Brown*, 9 M. & W. 501.

(*o*) *Kaye v. Dutton*, 7 M. & Gr. (49 E. C. L. R.) 807.

(*p*) 11 A. & E. (39 E. C. L. R.) 438, 447; *Deacon v. Gridley*, 24 L. J. (C. P.) 17; 15 C. B. (80 E. C. L. R.) 295.

(*q*) See also *Flight v. Reed*, 1 H. & C. 703, 32 L. J. (Ex.) 265, for an illustration of this rule.

¹ In some of the earlier American cases, there were many dicta and a few decisions in favour of a moral consideration being sufficient to support a promise: *Greeves v. McAllister*, 2 Binn. 591; *Willing v. Peters*, 12 S. & R. 177; *Doty v. Wilson*, 14 Johns. 378; but these cases, like the English decisions in *Lee v. Muggeridge*, and *Wing v. Mill*, 1 B. & Ald. 104, were subsequently expressly overruled by *Snevily v. Read*, 9 Watts, 396; *Kennedy v. Ware*, 1 Pa. St. 445; *Mills v. Wyman*, 3 Pick. 207; *Beaumont v. Reeve*, 8 Q. B. (55 E. C. L. R.) 483; *Cook v. Bradley*, 7 Conn. 57; *Loomis v. Newhall*, 15 Pick. 159; *Dodge v. Adams*, 19 Ib. 429; *Kinnerly v. Morton*, 8 Mo. 698; *Kenan v. Holloway*, 16 Ala. 58; and such a doctrine may, perhaps, be now fairly considered as having no established place in the jurisprudence of either country.—R.

See *Ellicott v. Peterson*, 4 Md. 476; *Womack v. Womack*, 8 Tex. 397; *Turner v. Chrisman*, 20 Ohio, 332; *M'Farland v. Mathis*, 10 Ark. 560; *Nash v. Russell*, 5 Barb. 556; *Watkins v. Halstead*, 2 Sand. 311; *Geer v. Archer*, 2 Barb. 420; *M'Kinley v. O'Keson*, 5 Pa. St. 369. There would appear, how-

trated by the case of a debt barred by the Statute of Limitations, a promise to pay which, if duly made,

ever, to be authority for an important exception to the general principle that a moral obligation is not a sufficient consideration. Wherever an actual benefit has been enjoyed from the unsolicited services of another, it is a sufficient foundation for an express promise, although no promise will be implied. Thus, an uncompleted contract on a railroad was assigned by the contractor for the benefit of creditors. There was in the hands of the railroad company a fund consisting of retained percentage, the assignor's right to which depended upon the completion of the contract. The assignor made a contract with the plaintiff that he should complete the contract at his own expense, and receive a certain compensation. The creditors, for whose benefit the assignment had been made, drew an order on the assignee in favour of plaintiff, for the amount expended by him on the work, and for a certain sum for his trouble. It was held that the work having been completed by the plaintiff, the order became irrevocable, whether drawn before or after performance of the work. And one of the creditors receiving a dividend out of the fund from the assignee, is liable to the plaintiff in an action for money had and received: *Cunningham v. Garvin*, 10 Pa. St. 366. Bell, J.: "If it be admitted that the order was made after the completion of the work, we have a case of a past consideration flowing from a benefit conferred. Now, though anciently this was thought inadequate to support a present promise to pay, it has long been settled that a benefit derived from the unsolicited services of another, creates a moral obligation of sufficient potency to sustain an express promise." On the other hand, where a grandfather devised to his grandson a tract of land, which, by his will, he directed should be patented, and the price thereof paid out of his estate, an uncle of the devisee's obtained the patent and paid for it, and brought an action against the executors of the grandfather's estate to recover it back; it was decided that it was a voluntary payment by him which gave no right of action: *Turner v. Patridge*, 3 P. & W. 172. Gibson, C. J.. "In procuring the patent without compulsion of the law, or request of the party interested, the plaintiff laid the defendants under a moral obligation, which, though sufficient as a consideration for an express promise, raised no promise by implication of law." *Baker v. Gregory*, 28 Ala. 544. Taxes were paid through mistake by one not the owner, and the owner promised to repay. The promise and benefit were held equivalent to a previous request: *Nixon v. Jenkins*, 1 Hilt. 318. When one partner purchases of his copartner his interest in the partnership property, under a mistake as to the true condition of the partnership accounts, but without fraud in the partner selling, there is no legal consideration for a promise of the latter to make up the amount of the mistake. The moral consideration is insufficient: *Eakin v. Fenton*, 15 Ind. 59. It is a general but not a universal rule that a moral obligation is a sufficient consideration to uphold an express promise: *Montgomery v. Lampton*, 3 Metc. (Ky.) 519. An express promise to pay for past expenditures made by a third person for a parent is not binding on the child for want of consideration: *Dawson v. Dawson*, 12 Iowa, 512. A mere moral obligation constitutes no legal consideration for a contract: *Udike v. True*, 13 N. J. Eq.

*as we shall see hereafter, takes the debt out of the protection of the statute and makes the [*204] debtor liable (r).

I have now said what I intended to say with regard to the sufficiency of the consideration, and the result may be thus summed up:—

Any advantage to the person promising, or damage, inconvenience, liability, or charge to the person to whom the promise is made, constitutes a sufficient consideration to uphold a promise; but, if that consideration be executed, that is, if, at the time of making the promise, that which is to be the consideration for it has already taken place, in such case there must have been a *request* by the person promising, in order to render

(r) It seems, however, not to be illustrated in the case of a debt released by a discharge in bankruptcy; for it has been held on the construction of s. 49 of the now repealed Bankruptcy Act of 1869 (32 & 33 Vict. c. 71), that, when a debt has been released by an order of discharge under that section, a subsequent promise to pay cannot be enforced (*Heather v. Webb*, 2 C. P. D. 1; 46 L. J. (Q. B. etc.) 89); unless it is founded on a new and valuable consideration (*Jakeman v. Cook*, 4 Ex. Div. 26; 48 L. J. (Q. B., etc.) 165); and this would seem to be still the law under the corresponding section of the Bankruptcy Act of 1883 (46 & 47 Vict. c. 52), viz., s. 30, which in this respect seems undistinguishable from s. 49 of the old Act.

151; *Shepard v. Rhodes*, 7 R. I. 470. The moral obligation of the original contract is a sufficient consideration for a promise to perform it made within the time limited by the statute, and such a promise will remove the bar of the Statute of Limitations: *Pritchard v. Howell*, 1 Wis. 131. Where there is a precedent duty, which would create a sufficient legal or equitable right if there had been an express promise at the time, or where there is a precedent consideration which is capable of being enforced, and is not extinguished, unless at the option of the party, founded upon some defence which the law justifies but does not require him to assert, an express promise will create or revive a just cause of action. So if a contract is voidable, but founded on a consideration otherwise valuable, an express promise will support it: but not if it is originally void. A promise by a woman who is sole to pay a debt contracted while she was covert will not be valid, because such contract is *ab origine* void, and not voidable: *Porterfield v. Butler*, 47 Miss. 165; and see *Shepard v. Rhodes*, 7 R. I. 470; *Musser v. Ferguson*, 55 Pa. St. 475; *Cobb v. Cowdery*, 40 Vt. 25; *Seymour v. Marlboro*, Ib. 171.—s.

such a consideration sufficient. If an *express request* can be shown, there can be no difficulty; but, if not, the law will imply one in certain cases, and those cases are—

[*205] *1st. Where the consideration consists in the person to whom the promise is made being compelled to do that which the person making it ought to have done, and was compellable to do.

2ndly. Where the consideration consists in something the benefit of which the person promising has adopted and enjoyed.

3rdly. Where the consideration consists in the person to whom the promise is made having *voluntarily* done that which the person promising ought to have done, and was *compellable* to do, in which third case the promise must be an *express* one, whereas in the two former the law implies the promise as well as the request.

The remaining part of a contract is the promise, as to which the law in general leaves to the will of the parties this part of their mutual arrangement. Indeed, this has almost been said already in other words; for, where it is laid down that the law will not weigh the adequacy of the consideration (s), it is implied that it will not weigh that of the promise. The law, however, will no more enforce an illegal promise than an illegal consideration; but in cases of executed contracts there is a rule of law which is well worthy of attention. It is, that where the law [*206] implies a certain promise *from a consideration executed—that consideration will not support any other promise than the one which the law implies (t). It is not difficult to see that this rule results

(s) *Ante*, p. *176.

(t) *Elderson v. Emmens*, 6 C. B. (60 E. C. L. R.) 160, in Exchequer Chamber.
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from the principle which requires that every promise should be supported by a consideration; for, when the consideration in question is one from which the law implies a certain promise, that promise evidently exhausts the consideration, and there is nothing left to support any other promise. Such promise, consequently, however expressly made, is *nudum pactum*. Thus, it has been decided (*u*), that an account stated and a sum thereupon found to be due to the plaintiff from which the law implies a promise to pay *in præsenti*, will not support a promise to pay *in futuro*; and each of the Judges (*v*) said, that, in order to render the promisor liable to pay on a future day, there ought to be some new consideration. Similar in principle to the instance just mentioned is the case, where one, having become tenant to another of a farm, undertook to make a certain quantity of fallow, to spend £60 worth of manure yearly thereon, and to keep the buildings in repair: an undertaking which was considered unavailable *in [*207] law because no other consideration existed but the fact that the relation of landlord and tenant had been created between the parties, and the obligations sought to be enforced are not implied by law from that mere fact (*x*). The promise, as the Court of Exchequer said in a subsequent and closely analogous case (*y*), is laid more largely than the law will imply from such a relation.

Another instance of the same principle, drawn from a different class of cases, is afforded by the case of

(*u*) *Hopkins v. Logan*, 5 M. & W. 241; *Granger v. Collins*, 6 M. & W. 458; *Roscorla v. Thomas*, 3 Q. B. (43 E. C. L. R.) 234. See *Walker v. Rostron*, 9 M. & W. 411; and 1 Smith, L. C. 163, 8th ed.

(*v*) Lord *Abinger*, C. B., and *Parke*, *Alderson*, and *Maule*, B.B., in *Hopkins v. Logan*, *supra*.

(*x*) *Brown v. Crump*, 1 Marsh. 567.

(*y*) *Granger v. Collins*, 6 M. & W. 458; *Jackson v. Cobbin*, 8 M. & W. 790.

Roscorla v. Thomas (z), in which the declaration alleged that, in consideration that the plaintiff *had* bought a horse of the defendant at a certain price, the defendant promised that it did not exceed five years old, and was sound and free from vice; and the plaintiff having obtained a verdict, the Court arrested the judgment, because the only promise which could be implied from the consideration was to deliver the horse upon request; and, therefore, however expressly the promise alleged might have been made, the consideration would not support it.

Proceeding in the order in which I stated to you that it was my intention to proceed, the next subject at which we arrive is, the effect of *illegality* upon the contract.

[*208] And, upon this subject, I have *already said generally, that every contract, be it by deed, or be it without deed, is void if it stipulate for the performance of an illegal act, or if it be founded upon an illegal consideration. *Ex turpi causâ non oritur actio* is the maxim of our law, as well as of the civil.¹ A deed, for

(z) 3 Q. B. (43 E. C. L. R.) 234.

¹ [Note by Mr. J. C. Symons.] It is immaterial whether the illegality be part of or only introductory to the cause of action; if the plaintiff requires any aid from an illegal transaction to make out his case, he cannot maintain it: *Simpson v. Bloss*, 7 Taunt. (2 E. C. L. R.) 246; [*Scott v. Duffy*, 15 Pa. St. 18; *Deering v. Chapman*, 22 Me. 448.] This rule was upheld in the very recent case of *Fivaz v. Nicholls*, 15 L. J. 125, C. P. [2 C. B. (52 E. C. L. R.) 500,] where the plaintiff brought an action on the case against the defendant for having corruptly conspired to cheat the plaintiff, and deprive him of his costs in a previous action on a bill of exchange, in which the plaintiff obtained judgment on the ground that it was given for an illegal consideration; but it having appeared that the bill had been originally endorsed by the plaintiff to the defendant to compromise a felony, this illegality being the foundation of the subsequent action, was held to invalidate it. [And to the same effect are *Bridge v. Hubbard*, 15 Mass. 96; *Tuthill v. Davis*, 20 Johns. 287; *Edwards v. Skirving*, 1 Brev. 548; *Coulter v. Robertson*, 14 Sm. & M. 29, where the illegality of the original consideration was held to taint all the subsequent securities flowing from it.—R.]

It is well settled that in reference to all acts or contracts, which are unlawful on account of their immorality or their tendency to promote it, or because they are hostile to public policy, the parties thereto are *in pari delicto*. So,

the purpose of charging the maker, requires, as we have seen, no consideration at all to support it; but an illegal consideration is worse than none, and if it be founded upon such an one, it will be void, nor will the rules relating to estoppel prevent the party from setting that defence up. A simple contract *requires*, as we have seen, a consideration to support it. If the consideration be illegal, it is *à fortiori void*; nor will the rules which I endeavoured to explain regarding the inadmissibility of parol evidence to contradict a writing, prevent that defence from being set up where the illegality does not appear on the face of the instrument, any more than the doctrine of estoppel will avail to prevent inquiry into the true consideration for a deed. Parties cannot deceive the law by the form of their contracts; and, as an illegality in the consideration is fatal, so, and upon the very same grounds, is one in the promise. “*You shall not*,” says the L. C. J., in *Collins v. Blantern* (a), “*stipulate for iniquity*.”¹

(a) 2 Wils. 341, 1 Smith, L. C. 387, 8th ed. See *ante*, p. *18, where this subject is partially treated of.

money paid or land conveyed on an immoral contract, cannot be recovered back: *White v. Hunter*, 23 N. H. 128. Every new agreement entered into for the purpose of carrying into effect any of the unexecuted provisions of a previous illegal contract is void: *Gray v. Hook*, 4 N. Y. 449.

When money due on an illegal contract is paid to an agent of one of the parties, such agent being no party in interest to the illegal contract, cannot set up the illegality as against the claim of his principal: *Evans v. Trenton*, 24 N. J. 764. Where an obligor sued on his bond, which exhibits no evidence of fraud, interposes, by way of defence, a fraudulent agreement between himself and the obligee, he becomes the actor; and the maxim *in pari delicto melior est conditio possidentis aut defendentis*, is applied against him and not in his favor: *Hendrickson v. Evans*, 25 Pa. St. 441. A party to an illegal contract will not be permitted to avail himself of its illegality, until he restores to the other party all that had been received from him on such illegal contract: *Hunt v. Turner*, 9 Tex. 385. And see also *Jones v. Davidson*, 2 Sneed, 447; *Gibson v. Pearsall*, 1 E. D. Sm. 90; *Bates v. Watson*, 1 Sneed, 376; *Schermerhorn v. Talman*, 14 N. Y. 93; *Tracy v. Talmage*, Ib. 162 —s.

¹ Where an entire agreement contains an element which is legal and one

If the consideration be legal, a promise to do several acts, some illegal and some legal, renders *the [*209] contract void as to the illegal acts; but if any part of the consideration be illegal, the whole contract fails (b).¹

Now illegality is of two sorts: it exists at *common law*, or is created *by some statute*.

A contract illegal at common law is so on one of three grounds: either *because it violates morality*; or *because it is opposed to the policy of the law*; or *because it is tainted with fraud*.

Of the first class,—those, namely, which are void because they violate the principles of morality—you will find an example in the case of *Fores v. Johnes (c)*, in which Mr. Justice *Lawrence* held, that a printseller could not recover the price of libellous publications which he had sold and delivered to the defendant. “For prints,” said his Lordship, “whose objects are

(b) *Ante*, p. *20. See also *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549; 47 L. J. (Q. B.) 594.

(c) 4 Esp. 97.

which is against public policy and therefore void, the legal consideration cannot be separated from that which is illegal so as to found an action on it: *Ross v. Truax*, 21 Barb. 361; *Pettit v. Pettit*, 32 Ala. 288; *Collins v. Merrell*, 2 Metc. (Ky.) 163; *Valentine v. Stewart*, 15 Cal. 387; *Gelpcke v. Dubuque*, 1 Wall. 221.—s.

¹ See *ante*, p. *20, note 1. When the consideration is indivisible, and is illegal, the contract is void. But when the Court can divide the consideration, it may be possible to reject what is illegal, and yet to support the promise upon that part which is valid. As, for example, where a part of the consideration failed as falling within the Statute of Frauds, but the remainder was held sufficient to uphold the contract: *Mayfield v. Wadsley*, 3 B. & C. (10 E. C. L. R.) 361. Where there are *several considerations*, and some are illegal; these may be disregarded as merely cumulative grounds for the promise, which rests upon the valid considerations: *Jones v. Waite*, 1 Bing. N. C. (27 E. C. L. R.) 341; *Shackell v. Rosier*, 2 Bing. N. C. (29 E. C. L. R.) 646; *King v. Sears*, 2 C. M. & R. 48; *Crookshank v. Rose*, 5 C. & P. (24 E. C. L. R.) 19, *Andrews v. Ives*, 3 Conn. 368; *Loomis v. Newhall*, 15 Pick. 159; *Treadwell v. Davis*, 34 Cal. 601; *Goodwin v. Clark*, 65 Me. 280.

general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral, nor for such as are libels on individuals, and for which the plaintiff might be rendered criminally answerable for a libel.”¹

For this reason the printer of an immoral and libellous work cannot maintain an action for the price of

¹ So it was held that the printer of the “Memoirs of Harriet Wilson” could not recover the price of printing them, the work being immoral and libellous: *Poplett v. Stockdale*, 2 C. & P. (12 E. C. L. R.) 198.

Nothing is better settled than that a promise in consideration of future illicit cohabitation is void: *Walker v. Perkins*, 3 Burr. 1568; *Rex v. Inhabitants of Withrington*, 1 B. & Ad. (20 E. C. L. R.) 912; *Winnebrun v. Weisiger*, 3 Mon. 35; *Travinger v. M'Burney*, 5 Cow. 253; and it is immaterial whether such promise be or be not backed by the solemnity of a seal: *Walker v. Perkins*. But where the sealed instrument is given in consideration of *past* seduction or cohabitation, it will be enforced: *Turner v. Vaughan*, 2 Wils. 339; *Wye v. Mosely*, 6 B. & C. (13 E. C. L. R.) 133; while a *parol* promise, based upon such a consideration, is worthless: *Beaumont v. Reeve*, 8 Q. B. (55 E. C. L. R.) 483; *Singleton v. Bremar*, Harp. 201. The distinction between these classes of cases is this: *all* contracts, whether sealed or *parol*, based upon *future* immoral connection, are void, because to enforce them would be to offer a premium for future immorality. And *all* *parol* contracts in consideration of *past* connection are void, on the simple ground of the consideration being executed, and the transaction not being such, as according to the rules already explained, the law would *imply* a promise to pay for. But a *specialty* given for *past* connection can be enforced, because there is a consideration, viz., that imported by the seal, and as regards the immorality, the injury having been already done, there is no principle of law that forbids its being remedied, and it has been latterly held that even if the connection be continued after the giving of the bond, that will not vitiate the instrument, if such continuance did not enter into the transaction: *Hall v. Palmer*, 3 Hare, 532; and in a trial at Nisi Prius, *Best*, C. J., left it to the jury to determine, whether at the time of giving such bond, the continuance of the connection formed part of the transaction, for if it did, the obligee could not recover; if it did not, there was nothing in the transaction prohibited by the law: *Friend v. Harrison*, 2 C. & P. (12 E. C. L. R.) 584.

There is a class of cases which determine that promises in consideration of a forbearance or compromise of a prosecution for bastardy, can be enforced: *Haven v. Hobbs*, 1 Vt. 238; *Halcomb v. Stimpson*, 8 Ib. 141; *Robinson v. Crenshaw*, 2 Stew. & P. 276; *Maurer v. Mitchell*, 9 W. & S. 71; and these cases proceed upon the ground of the prosecutions being rather civil in their character.—R.

his labour against the publisher who employed him.

[*210] "I have no hesitation," said *Best*, *C. J., "in declaring that no person who has contributed his assistance to the publication of such a work can recover in a Court of Justice any compensation for the labour so bestowed. The person who lends himself to the violation of the public morals and laws of the country, shall not have the assistance of those laws to carry into execution such a purpose. It would be strange if a man could maintain an action at law for doing that for which he could be fined and imprisoned. Every one who gives his aid to such a work, though as a servant, is responsible for the mischief of it" (*d*). Upon these and similar reasonings, it has been held, that the first publisher of a libellous or immoral work cannot maintain an action against any person for publishing a pirated edition (*e*). Nor will an injunction be granted to restrain the piracy on the application of the author or publisher, the general rule of Equity having been not to give relief of this kind except where a Court of Law gave damages (*f*). And where the plaintiff, a printer, having agreed to print for the defendant a work which was to contain a dedication to be thereafter sent him, printed the work and also the dedication, but on the latter being returned to him revised, discovered for the first time that it contained libellous matter, whereupon he refused to continue the printing of it: it was held, *that the dedication being libellous, [*211] the plaintiff was justified in refusing to publish it, and was entitled to recover the expense of printing the body of the work from the defendant, who had refused to accept or pay for the work without the dedica-

(*d*) *Poplett v. Stockdale*, R. & M. 337.

(*e*) *Stockdale v. Onwhyn*, 5 B. & C. (11 E. C. L. R.) 173.

(*f*) *Walcot v. Walker*, 7 Ves. 1.

tion (*g*). And, more recently, where the defendant contracted to let rooms to the plaintiff, but afterwards discovering that they were intended to be used for the delivery of lectures of a blasphemous character, refused to allow the use of the rooms: it was held, that he was justified in his refusal, as the contract was illegal, and could not therefore be enforced at law (*h*).

A large proportion of the examples of the application of this rule afforded by the books is, where illicit cohabitation or seduction has been brought forward as the consideration of the contract. These, if intended to be future, are illegal considerations (*i*);¹ if already past, they are, as formerly explained, no consideration at all (*k*). Even the supplying lodgings or clothing (*l*), or a carriage to a prostitute for the purpose of enabling her to carry on her practices, is [*212] illegal, and the creditor cannot recover the price (*m*).

Again, to quote the words of *Cockburn*, C. J., in *Harrington v. Victoria Graving Dock Co.* (*n*), "when a bribe is given, or a promise of a bribe is made, to a person in the employ of another by some one who has contracted, or is about to contract, with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer,

(*g*) *Clay v. Yates*, 25 L. J. (Ex.) 237; 1 H. & N. 73.

(*h*) *Cowan v. Milbourn*, L. R. 2 Ex. 230; 36 L. J. (Ex.) 124.

(*i*) *Walker v. Perkins*, 3 Burr. 1568.

(*k*) *Bridges v. Fisher*, 23 L. J. (Q. B.) 276; 3 E. & B. (77 E. C. L. R.) 642; *Beaumont v. Reeve*, 8 Q. B. (55 E. C. L. R.) 483.

(*l*) *Girardy v. Richardson*, 1 Esp. 13; *Jennings v. Throgmorton*, R. & M. (21 E. C. L. R.) 251; *Bowery v. Bennet*, 1 Camp. 348. See *Feret v. Hill*, 23 L. J. (C. P.) 185; 15 C. B. (80 E. C. L. R.) 207. See also *Smith v. White*, L. R. 1 Eq. 626; 35 L. J. (Ch.) 454; *Taylor v. Chester*, L. R. 4 Q. B. 309; 38 L. J. (Q. B.) 225.

(*m*) *Pearce v. Brookes*, 35 L. J. (Ex.) 134; L. R. 1 Ex. 213.

(*n*) 3 Q. B. D. 549, 551; 47 L. J. (Q. B.) 594, 595. See also *Smith v. Sorby*, 3 Q. B. D. 552, n.

¹ *Walker v. Gregory*, 36 Ala. 180.—s.

the agreement is a corrupt one, and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be. The tendency of such an agreement as this must be to bias the mind of the agent or other person employed, and to lead him to act disloyally to his principal. It is intended by the party who promises the bribe to have that effect, and the other party knows such is his intention. Such a bargain is obviously corrupt." In the particular case from which these words are cited, the defendants had contracted to pay the plaintiff a commission for superintending repairs to be executed by them on certain ships belonging to the Great Eastern Railway Company. The plaintiff, [*213] at the time of such contract being *made, was in a position of trust in relation to the railway company, having been employed by them as an engineer to advise them as to the repairs, and the contract between defendants and plaintiff was made in part in consideration of a promise that the plaintiff would use his influence with the railway company to induce them to accept the defendants' tender for the repair of the ships. The jury found that the contract, though calculated to bias the mind of the plaintiff, had not, in fact, done so, and that he had not in consequence thereof given less beneficial advice to the company as to the defendants' tender than he would otherwise have done. But the Court held that the plaintiff could not maintain an action for commission under the contract, on the ground that, even although the plaintiff had not been induced to act corruptly, the consideration for the contract was corrupt.

Next, with regard to the second class—those, namely, which are void as contravening the policy of the law. It might, perhaps, have seemed more simple to have ranked this and the former in one and the same class,

since it is obvious, that, wherever a contract has an immoral tendency, there it is opposed to the policy of the law. But the reason for dividing them into two classes is, that there are some contracts which involve no offence against the laws of morality, and nevertheless are opposed to policy ; such, for instance, as contracts in *general* **restraint* of trade, and which, therefore, are arranged in a class by themselves. [*214]

There seems to be nothing obviously immoral in a man's promising or covenanting not to carry on his trade within the limits of England. Nevertheless, such a covenant or promise has been held totally void. This was decided so long ago as in the reign of Henry V. ; in the Year Book of the 2nd year of which reign, fol. 5, pl. 26, a bond restraining a weaver from exercising his trade was held void : and Judge *Hull* flew into such a passion at the sight of it, that he swore on the bench, and threatened to send the obligee to prison till he had paid a fine to the King ; upon which Lord *Macclesfield* observes, in *Mitchell v. Reynolds* (o), " that he could not but approve of the indignation the judge expressed, though not his manner of expressing it." Accordingly such contracts were declared to be void in that case, and have ever since been held void (p).

" The law," said *Best*, C. J., in *Homer v. Ashford* (q), " will not allow or permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his *capital in any useful [*215] undertaking in *the kingdom*, would be void.

(o) 1 P. Wms. 181, 194 ; 1 Smith, L. C. 417, 428, 8th ed. ; *Gunmakers' Company v. Fell*, Willes, 384.

(p) At any rate until quite recently. See *post*, p. *223.

(q) 3 Bing. (11 E. C. L. R.) 322, 326.

But here arises a distinction, which was first illustrated by Lord *Macclesfield*, in the celebrated case of *Mitchell v. Reynolds*, before mentioned, which has ever since been upheld. It is, that though a contract in *general* restraint of trade is void, one in *partial* restraint of trade may be upheld; provided the restraint be reasonable, and provided the contract be founded upon a consideration. "It may often happen," continued Lord *Wynford* (then Chief Justice *Best*), at the place which I have just cited, "that individual interest and general convenience render engagements not to carry on trade or act in a profession at a particular place proper." "Contracts for the partial restraint of trade are upheld," said the Court of Exchequer in *Mallan v. May* (*r*), "not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported: such is the case of the disposing of a shop in a particular place, with a contract on the part of the *vendor* not to carry on a trade in the same place. It is [*216] in *effect the sale of a good-will, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry (*r*¹). And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract that he will not carry on the same trade or profession within certain

(*r*) 11 M. & W. 563.

(*r*¹) *Prugnell v. Grosse*, *Alleyn*, 67; *Broad v. Jollyffe*, *Cro. Jac.* 596; *Jelliott v. Broad*, *Noy*, 98.

limits (s). In such a case the public derives an advantage in the unrestrained choice which such stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business." But it must always be borne in mind, "that contracts in restraint of trade are in themselves, if nothing more appears to show them reasonable, bad in the eye of the law" (t)¹.

Examples of what are considered partial restraints of trade are numerous in the books; they are usually **partial** in respect of time, as not to exercise it for a specified period; or in respect of space, as not to trade within a given district; and *a restraint limited [*217] as to space may be unlimited as to time and yet good (u). In *Gale v. Reed* (x), the contract was for one party not to trade with a certain class of persons in the mode specified, provided the other party traded with them therein. The defendant covenanted not to exercise the business of a ropemaker during his life, except on government contracts, and to employ the plaintiffs exclusively to make all the cordage which

(s) *Chesman v. Nainby*, 2 Ld. Raym. 1456; 2 Stra. 739.

(t) *Tindal, C. J., Horner v. Graves*, 7 Bing. (20 E. C. L. R.) 744. But see *Tallis v. Tallis*, 22 L. J. (Q. B.) 185.

(u) *Catt v. Tourle*, L. R. 4 Ch. 654, 33 L. J. (Ch.) 565; *Elves v. Crofts*, 10 C. B. (70 E. C. L. R.) 241, cited *post*, p. *223.

(x) 8 East, 80.

¹ *Warner v. Jones*, 51 Me. 146; *Clark v. Crosby*, 37 Vt. 188; *Hard v. Seeley*, 47 Barb. 428; *McClurg's Appeal*, 58 Pa. St. 51; *Jenkins v. Temples*, 39 Ga. 655; *Treat v. Shoniger Melodeon Co.*, 35 Conn. 543; *Gillis v. Hall*, 2 Brewst. 342; *Crawford v. Wick*, 18 Ohio St. 190; *Guerand v. Dandeleit*, 32 Md. 561; *Warfield v. Booth*, 33 Ib. 63; *Dean v. Emerson*, 102 Mass. 480; *More v. Bonnet*, 40 Cal. 251; *Perkins v. Clay*, 54 N. H. 518; *Nougland v. Segur*, 38 N. J. 230; *Dwight v. Hamilton*, 113 Mass. 175; *Brown v. Rounsavell*, 78 Ill. 589; *Roller v. Ott*, 14 Kan. 609; *Peltz v. Eichelle*, 62 Mo. 171.—s.

should be ordered of him by his connexion. The plaintiffs were to allow him 2s. per cwt. on the cordage made by them for such of his connexion whose debts should turn out to be good, but were not to be compelled to furnish goods to any whom they were not willing to trust. The Court considered that the defendant was not prevented from supplying those of his connexion whom the plaintiffs rejected, and consequently that the restraint to follow his trade was partial only. Such restraints were upheld in the case of *Chesman v. Nainby*, decided in the House of Lords upon writ of error (*y*), in which the agreement was, not to carry on the trade of a linendraper within half a mile of the place where the party was to serve as assistant; in that of *Bunn v. Guy* (*z*), where the agreement was, that one attorney *in London selling [*218] his business to others should not practice as an attorney within London, or 150 miles thereof; and in that of *Proctor v. Sargent* (*a*), where the servant of a cowkeeper in London engaged not to carry on the same trade as his master within five miles for twenty-four months after the determination of his service. Indeed nothing, as you must be well aware, can be more common upon a dissolution of partnership, than for the retiring partner to covenant that he will not set up the same trade within a certain distance to the injury of the continuing partner. But these restraints must, in order to be upheld, be *reasonable*; that is, a greater restriction must not be wantonly imposed than can be necessary for the protection intended.

In *Horner v. Graves* (*b*), 100 miles from the place

(*y*) 2 Str. 739; 3 Bro. P. C. 349.

(*z*) 4 East, 190; *Whittaker v. Howe*, 3 Beav. 383; *Dendy v. Henderson*, 24 L. J. (Ex.) 324; *Nicholls v. Stretton*, 10 Q. B. (59 E. C. L. R.) 346.

(*a*) 2 M. & Gr. (40 E. C. L. R.) 20; *Benwell v. Inns*, 24 L. J. (Ch.) 663.

(*b*) 7 Bing. (20 E. C. L. R.) 735.

where a dentist carried on business was considered an unreasonable space from which to exclude an assistant and pupil from practising the same profession after his service was determined and his instruction completed. "We do not see," said *Tindal*, C. J., in delivering the judgment of the Court of Common Pleas, "how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the *interest of the party in favour of whom it is [*219] given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either, it can only be oppressive; and, if oppressive, it is in the eye of the law, unreasonable. Whatever is injurious to the interests of the public, is void, on the grounds of public policy. In the case above referred to (*Mitchell v. Reynolds*) (c) Lord Chief Justice *Parker* says, 'A restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on in a particular place is good;' which are rather instances or examples than limits of the application of the rule, which can only be at last what is a reasonable restraint with reference to the particular case. In that case the plaintiff had assigned to the defendant the lease of a house in the parish of A. for five years, and the defendant entered into a bond conditioned that he would not exercise the trade of a baker within that parish during that term; and the restraint was held good, because not unreasonable either as to the time or distance, and not larger than might be necessary for the protection of the plaintiff in his established trade. No certain precise boundary can be laid down

(c) 1 P. Wms. 181, 1 Smith, L. C. 417, 8th ed. This case, with the note thereon, should be carefully studied.

within which the restraint would be reasonable, and beyond which, excessive. In *Davis v. *Mason* (*d*), [*220] where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable. In one of the cases referred to by the plaintiff, 150 miles was considered as not an unreasonable restraint, where an attorney had bought the business of another who had retired from the profession. But it is obvious that the profession of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence, or by agents. And unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to show them reasonable, bad in the eye of the law; and upon the bare inspection of this deed, it must strike the mind of every man that a circle round York traced with the distance of one hundred miles incloses a much larger space than can be necessary for the plaintiff's protection." *A fortiori*, where the plaintiff, a coal merchant in London, had taken the defendant into his service as town traveller and collecting clerk, and the defendant agreed that he would not within two years after leaving the plaintiff's service, solicit or sell to any customer of [*221] the plaintiff, and would not follow or *be employed in the business of a coal merchant for nine months after he should have left the employment of the plaintiff, the contract was decided to be void, as a restraint of trade unlimited in point of space (*e*). "I cannot express," said *Parke*, B., in this case, "the rule

(*d*) 5 T. R. 118.

(*e*) *Ward v. Byrne*, 5 M. & W. 548, 561; and see *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59; 42 L. J. (Ch.) 12.

on this subject better than has been done by *Tindal*, C. J., in giving the judgment of the Court of Exchequer Chamber in *Hitchcock v. Coker* (*f*), where he says, 'We agree in the general principle adopted by the Court of Queen's Bench, that, where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract that would enforce it must be therefore void.' Now a restraint prohibiting a party from carrying on trade within certain limits of space would be good, and a contract entered into for the purpose of enforcing such an agreement as that would be valid; and the limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party with whom the contract is made." The cases upon this branch of the subject are reviewed by the Court of Exchequer in the great case of *Mallan v. May*, before mentioned; and it may be *convenient to the student to subjoin the brief observations made upon them by that Court in giving judgment (*g*):—

"Applying this rule and referring to the analogous authorities, it appears to us, that, for such a profession as that of a dentist, the limit of London is not too large. In *Davis v. Mason* (*h*), Thetford and ten miles round, in *Hayward v. Young* (*i*), twenty miles round a place, were held reasonable limits in the case of a surgeon; in that of an attorney, London and one hundred and fifty miles round, in *Bunn v. Guy* (*k*); and in

(*f*) 6 A. & E. (33 E. C. L. R.) 453.

(*g*) 11 M. & W. 667.

(*h*) 5 T. R. 118.

(*i*) 2 Chit. 407; *Atkins v. Kinnier*, 4 Ex. 776; *Sainter v. Ferguson*, 7 C. B. (62 E. C. L. R.) 716.

(*k*) 4 East, 190.

Proctor v. Sargent (*l*), five miles from Northampton Square, in the county of Middlesex, was held reasonable in the case of a milkman. And it makes no difference, in our opinion, that it appears on the face of this record that London contains a million of inhabitants. We doubt, indeed, whether the comparative populousness of particular districts ought to enter into consideration at all; if it did, it would be difficult to exclude others, such as the number of men of the same profession, the habits of the people in that neighbourhood, and other matters of a fluctuating and uncertain character, which would produce great difficulty and embarrassment in determining such question." Yet [*223] the *Court will take into consideration the circumstances at the time of the execution of the bond and the nature of the business, the goodwill of which was sold (*m*).

Upon this principle a covenant not at any time to carry on the business of a butcher within five miles of the place where the covenantor carried it on, before his sale of the business to the covenantee, has been supported as not unreasonable either in respect of time or distance (*n*). And in *Tallis v. Tallis* (*o*), the Court of Queen's Bench declared that any covenant is valid unless it plainly appear that a restriction is imposed by it beyond what the interest of the covenantee requires.

The proposition that a covenant or promise not to carry on a trade within the limits of England is totally

(*l*) 2 M. & Gr. (40 E. C. L. R.) 20; *Pemberton v. Vaughan*, 10 Q. B. (59 E. C. L. R.) 87.

(*m*) *Avery v. Langford*, 23 L. J. (Ch.) 837; *Harms v. Parsons*, 32 Beav. 328; 32 L. J. (Ch.) 247.

(*n*) *Elves v. Crofts*, 10 C. B. (70 E. C. L. R.) 241.

(*o*) 1 E. & B. (72 E. C. L. R.) 391; S. C., 22 L. J. (Q. B.) 185. See *Mumford v. Gething*, 7 C. B. N. S. (97 E. C. L. R.) 305; 29 L. J. (C. P.) 105.

void (*p*), seems somewhat qualified in the recent case of *Leather Cloth Company v. Lhorsont* (*q*). There a company was formed for the purchase and working of certain patents and processes for the manufacture of American leather cloth; and the agreement for the purchase contained a provision, that the vendors "will not *directly or indirectly carry on, nor will they, [*224] to the best of their power, allow to be carried on by others, in any part of *Europe*, any company or manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory" (of the vendors), "and will not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits hereby agreed to be purchased." *James, V. C.*, held, that the restriction contained in this clause was not greater, having regard to the subject-matter of the contract, than was necessary for the protection of the purchasers. His Honour, however, seems to have to some extent proceeded on the ground that the case much more resembled "the sale of a secret, which has been held to be perfectly good, with a stipulation unlimited as to time and place as to communicating the secret, or dealing with it so as to interfere with the purchaser. It is settled by authority that a man may bind himself not to communicate that process to anybody else anywhere, under any circumstances, in any part of the world" (*r*). But still more recently it

(*p*) *Ante*, p. *214.

(*q*) L. R. 9 Eq. 345; 39 L. J. (Ch.) 86.

(*r*) *Leather Cloth Co. v. Lhorsont*, L. R. 9 Eq. 345, 354; 39 L. J. (Ch.) 86, 90. "Although the policy of the law will not permit a general restraint of trade, yet a trader may sell a secret of business, and restrain himself generally from using that secret." Per Sir *J. Leach*, V. C., in *Bryson v. Whitehead*, 1 Sim. & S. 74, 77.

[*225] has been *held that a contract, unlimited in point of space whereby the defendant agreed with the plaintiffs not to establish himself in the champagne trade, was not under the circumstances of that trade unreasonable and might be enforced (s).

It may be mentioned here that where one covenants with another not to carry on business within a given distance of that other's house, this distance is to be calculated, popularly speaking, "as the crow flies," more accurately, by drawing a circle on a map, the radius of which is the given distance measured on the map. And where the question is whether the covenant is broken by the too great proximity of one house to another, then, in measuring the distance, it should be taken from the nearest point of the one house to the nearest point of the other, without regard to where the doors are situated (t).

Further, contracts in restraint of trade must, in order to be good, be founded on a consideration, even although they be made by deed. "Where one agrees," said Lord *Lyndhurst* in a remarkable case, which is well [*226] worthy of attention (u), "with *another to employ him, and the latter agrees not to work for any third person, such agreement is a partial restraint of trade, and must be supported by adequate consideration." Thus, in the case of *Hutton v. Parker* (x), it was held most clearly by the Court of Queen's Bench, that in an action on a bond given by the defendant not to enter into the service of any other than the plain-

(s) *Rousillon v. Rousillon*, 14 Ch. Div. 351; 49 L. J. (Ch.) 338.

(t) *Moufflet v. Cole*, L. R. 8 Ex. 32 (Ex. Ch.), S. C. 42 L. J. (Ex.) 8, affirming L. R. 7 Ex. 70; S. C. 41 L. J. (Ex.) 28; *Duignan v. Walker*, Johns. 446; 28 L. J. (Ch.) 867.

(u) *Young v. Timmins*, 1 C. & J. 339. See also *Collins v. Locke*, 4 App. Cas. 674; 48 L. J. (P. C.) 68.

(x) 7 Dowl. 739.

tiff within ten miles of the town of Sheffield, some consideration must be shown on the declaration, in order to make it good; and the Court refused to presume one. But where an artisan agreed with manufacturers to serve for seven years, and not work for any other without leave; that in times of depression of trade he should be paid part only of his wages, but if ill, another was to be employed in his room; and that they should pay him wages and house rent, but be at liberty to dismiss him on a month's notice; the Court, thinking that the manufacturers were bound to employ him for seven years, subject to their power of dismissal, held that there was a good consideration for the artisan's promise to serve them exclusively (*y*).¹

(*y*) *Pilkington v. Scott*, 15 M. & W. 657; *Sainter v. Ferguson*, 7 C. B. (62 E. C. L. R.) 716. See 1 Smith, L. C. 435-437, 8th ed.

¹ See the note to *Mitchell v. Reynolds*, in 1 Smith's L. C. 736. In this country, the general principle that contracts in restraint of trade, so far as they may prevent the exercise of a particular calling, are void, has been frequently recognized and enforced, as, for example, a contract never to be engaged in the business of founding iron: *Alger v. Thatcher*, 19 Pick. 51; manufacturing chocolate: *Vickery v. Welch*, *Ib.* 523; wool-carding: *Pyke v. Thomas*, 4 Bibb, 486, and the like; while the exception has been equally established of sanctioning such contracts where the restraint applies only to a particular locality: *Pierce v. Fuller*, 8 Mass. 223; *Pierce v. Woodward*, 6 Pick. 206; *Nobles v. Bates*, 7 Cow. 307; *Palmer v. Graham*, 1 Parsons' Eq. 476. It is stated in the text that the later English cases show an unwillingness to enter into the question of adequacy of consideration, and a strong instance of this may be seen in the very recent case of *Atkyns v. Kinnier*, 4 Exch. 776, where the defendant bound himself in the sum of £1000, as liquidated damages, not to practice as a physician within two miles and a half of a certain place. He did practice a few feet within that distance, measuring by a less frequented road than the usual thoroughfare, though by the latter he was beyond that distance, and there was no evidence that the plaintiff had sustained any damage from his having done so. The jury having, under the direction of the Court, found a verdict of £1000, the Court of Exchequer discharged a rule to reduce the damages to a shilling, and held that the defendant must abide by the contract he had made. But in New York, it has been held that, *prima facie*, the law presumes even limited restraints on trade to be void, and they only will be upheld upon sufficient proof of their reasonableness, both as to consideration and usefulness: *Chapel v. Brockway*, 21 Wend. 158; *Ross v. Sadgbeer*, *Ib.* 166. In the latter case, to a declaration on

It was at one time thought that the Courts would enter into the question of the adequacy of this consideration, and would hold the contract void if the consideration were inadequate. However, *it has [*227] been decided in the Exchequer Chamber, after great consideration, that the question of adequacy or inadequacy cannot be entertained, but that the parties must judge of that for themselves (z); a doctrine you may remember my citing as a strong instance of the unwillingness of the courts to enter into the question of the *adequacy of consideration* at all (a). The reason of this last rule is very succinctly expressed by *Alderson, B.*, in *Pilkington v. Scott*, above referred to: "Before the decision in *Hitchcock v. Coker*," he says, "a notion

(z) *Hitchcock v. Coker*, 6 A. & E. (33 E. C. L. R.) 438; *Archer v. Marsh*, Ib. 966; *Price v. Green*, 13 M. & W. 698; *per Parke, B.*

(a) *Ante*, p. *176, *et seq.*

a bond conditioned that the defendant should not manufacture pearl ash for ten years, nor within forty miles of a certain place, a general demurrer was sustained by the Court, on the ground that the consideration imported by the seal did not afford a presumption of such circumstances and reasons as were requisite to uphold such a contract. Prior and subsequent decisions in that State, have not, however, observed such a rule, and an agreement not to practice as a physician within six miles or pay \$500 for every month of such practice: *Smith v. Smith*, 4 Wend. 468; and an agreement not to set up a rival newspaper, or pay \$3000: *Dakin v. Williams*, 17 Wend. 447; *Williams v. Dakin*, 22 Ib. 201, were respectively enforced, and the sums named held to be liquidated damages, and not a penalty.—R.

A contract in general restraint of trade is void; but if in partial restraint of trade only, it may be supported, provided the restraint be reasonable, and the contract be founded on consideration: *Holmes v. Martin*, 10 Ga. 503; *Bowser v. Bliss*, 7 Blackf. 344; *Butler v. Burleson*, 16 Vt. 176; *Noah v. Webb*, 1 Edw. Ch. 604; *Alger v. Thacher*, 19 Pick. 51. An agreement between two persons for the manufacture and sale of a certain patented article, which provides for the continuance of the manufacture by one of them, and that the other after a certain time shall abstain therefrom, is not an agreement in restraint of trade: *Kinsman v. Parkhurst*, 18 How. 289; and see *Whitney v. Slayton*, 40 Me. 224; *Van Marter v. Babcock*, 23 Barb. 633; *Alcock v. Gibberton*, 5 Duer, 76; *Heichew v. Hamilton*, 3 Iowa, 596; *Beard v. Dennis*, 6 Ind. 200; *California Steam Co. v. Wright*, 6 Cal. 258; *Duffy v. Shockey*, 11 Ind. 70.—S.

prevailed that the consideration must be adequate to the restraint; that was, in truth, the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain."

Although the examples here given, and indeed by far the greater number of instances of contracts in restraint of trade, have been instances of restraint in time or place, the restraint which the law forbids within the limits before mentioned, is not confined to restraints in time or place. Thus, in one of the cases on the subject, a covenant by a licensee of a patent for a term of years not to make or vend during the residue of the term, any machines for effectuating the same thing as the patent was obtained for, without having the *patented* [*228] invention applied to those machines, was considered, and held not void (b).

Another example of contracts, illegal because in contravention of the policy of the law, is afforded by those cases in which contracts in general restraint of marriage have been held void (c). Thus, in *Lowe v. Peers* (d), a defendant entered into the following covenant:—"I do hereby promise Mrs. Catherine Lowe that I will not marry any person besides herself. If I do, I agree to pay her £1000 within three months after I shall marry anybody else." The Court of King's Bench held this contract void, remarking, "that it was not a promise to marry her, but not to marry any one else, and yet she was under no obligation to marry him." This case was affirmed in error (e).

(b) *Jones v. Lees*, 26 L. J. (Ex.) 9; 1 H. & N. 189. See *Hilton v. Eckersley*, 24 L. J. (Q. B.) 353, 25 L. J. (Q. B.) 199, in Ex. Ch.; 6 E. & B. (88 E. C. L. R.) 47.

(c) See *Newton v. Marsden*, 31 L. J. (Ch.) 690; *Robinson v. Ommaney*, 21 Ch. Div. 780; 23 Ib. 235; 51 L. J. (Ch.) 894; 52 Ib. 440.

(d) 4 Burr. 2225.

(e) 4 Burr. 2234.

So, where a lady gave a bond conditioned not to marry, the Court of Chancery ordered it to be delivered up (*f*).

On the subject of marriage I may further mention, that a deed tending to the *future* separation of husband and wife is *void* on grounds of public policy (*g*); although a deed providing a fund for the ^{*}lady's [*229] support on the occasion of an *immediate* separation is not so (*h*). And the Chancery Division will exercise its jurisdiction in giving effect to arrangements of property contained in articles of separation, such separation having previously taken place (*i*), and will restrain the husband from doing any act contrary to his covenant in such articles not to molest his wife (*k*). And even where the parties, after executing a lawful deed of separation, have been reconciled and have cohabited, the deed is not necessarily annulled thereby (*l*); but the performance of covenants therein will be compelled if it appear that such reconciliation was not intended to annul them (*m*). The distinction between the two cases of future and existing separation is obvious. The deed, in the former case, contemplates and facilitates that which the law considers an evil—namely, the separation of husband and wife; in the latter case, the evil is inevitable, and the effect of the deed is but to save the wife from destitution.

(*f*) *Baker v. White*, 2 Vern. 215.

(*g*) *Hindley v. Marquis of Westmeath*, 6 B. & C. (13 E. C. L. R.) 200.

(*h*) *Jee v. Thurlow*, 2 B. & C. (9 E. C. L. R.) 547; *Jones v. Waite*, in Dom. Proc. 4 M. & Gr. (43 E. C. L. R.) 1104.

(*i*) *Wilson v. Wilson*, 1 H. L. Cas. 538; *Gibbs v. Harding*, L. R. 8 Eq. 490, 5 Ch. 336; S. C. 38 L. J. (Ch.) 604, 39 Ib. 374; *Besant v. Wood*, 12 Ch. Div. 605.

(*k*) *Sanders v. Rodway*, 22 L. J. (Ch.) 230.

(*l*) *Wilson v. Mushett*, 3 B. & Ad. (23 E. C. L. R.) 743; *Randle v. Gould*, 27 L. J. (Q. B.) 57; 8 E. & B. (92 E. C. L. R.) 457.

(*m*) *Webster v. Webster*, 22 L. J. (Ch.) 837.

Almost the converse of these cases of deeds of *separation are what are called *Marriage brokerage contracts*, that is, where a man has agreed, [*230] in consideration of money, to bring about a marriage. These are all void as against public policy, the law considering that unions so brought about are unlikely to be happy ones. This class of cases is founded upon a case in the House of Peers (*n*),¹ in which Thomas Thinne gave an obligation of £1000 to Mrs. Potter, conditioned to pay her £500 within three months after he should be married to Lady Ogle, “a widow,” the reporter says, “of great fortune and honour, for she was the daughter and heir of Jocelyn Percy, Earl of Northumberland.” The Master of the Rolls decreed this bond to be void; the Lord Keeper reversed the decree; whereupon there was an appeal to the House of Peers; and, upon hearing the cause there, all the Lords but three or four were of opinion that all such contracts are of dangerous consequences, and ought not to be allowed; and they reversed the decree of dismissal made by the Lord Keeper, and decreed the obligation to be void.

Another, and an extensive class of cases is that in which the contract has a tendency to obstruct the course of public justice. These must be left for the next Lecture.

(*n*) *Hall v. Potter*, 3 Lev. 411.

¹ *Hall v. Potter* (which is also reported in 1 Eq. Ca. Ab. 89, and 3 P. Wms. 392, and Show. P. C. 76) has been followed by a numerous class of cases: *Cole v. Gibson*, 1 Ves. 503; *Roberts v. Roberts*, 3 P. Wms. 74, see Mr. Cox's note; *Smith v. Bruning*, 2 Vern. 392; *Duke of Hamilton v. Lord Mohun*, Ib. 652; *Boynnton v. Hubbard*, 7 Mass. 112; and Lord Redesdale, when Chancellor of Ireland, declared void a bond given to the obligee as a remuneration for having assisted the elopement of the obligor without the consent of the wife's friends, though the bond was given voluntarily after the marriage, and without any previous agreement therefor: *Williamson v. Gihon*, 2 Sch. & Lef. 362. The civil law, however, it is well known, in its approval and encouragement of the institution of marriage, allowed the *proxenetæ*, or match-makers, to stipulate, within limits, for a reward for promoting marriages: Code, Lib. 5, tit. 1, l. 6. [*Crawford v. Russell*, 62 Barb. 92.—s.]—E.

ILLEGAL CONTRACTS.—FRAUD.—GAMING AND HORSE-
RACING.—WAGERS.

THERE is another remarkable instance of contracts falling under the class of which we have been treating—namely of illegality created by the rules of common law, which it will be right to specify before proceeding to the next branch of the subject. It consists of contracts, void, because having a tendency to obstruct the administration of justice. Such was the very contract in *Collins v. Blantern* (a), before mentioned—the case which first established that the person who has executed a deed is not estopped from showing by way of defence, that it was executed for an illegal consideration, although he would not have been allowed to defend himself on the ground that there was no consideration for it at all. In that case, five persons were indicted for perjury, and it was agreed that Collins, who was their friend, should buy off the prosecutor's evidence by giving him a note for £350, in consideration of which he undertook not to appear at the Assizes. And it was further agreed that,

[*232] in *order to indemnify Collins against the consequences of being called upon to pay the note, Blantern should give Collins his bond conditioned for the payment of £350, the same sum for which the note was made. In an action brought upon the bond, the Court of Common Pleas held that it was void, and that a plea showing the consideration on which it was given was a good answer to the action. There is a case of

(a) 2 Wils. 341, 1 Smith, L. C. 387, 8th ed.

Unwin *v.* Leaper (*b*), which involves the same principle. There, an action of ejectment had been brought by Unwin against Leaper, when the latter gave notice of his intention to sue Unwin for certain statutable penalties incurred by him. Thereupon it was arranged that the action of ejectment should be dropped, that Unwin should pay down £50 towards Leaper's expenses in that action, and that Leaper should not proceed with the suit for the penalties; and the Court of Common Pleas held that the £50 which had been paid might be recovered back as a payment made in order to compromise a penal action. In another instance (*c*), where one of two parties *to an agreement to suppress [*233] a prosecution for embezzlement, sued the other for an injury indirectly arising out of that agreement, he was not allowed to maintain the action.

Of the soundness of these decisions, to use the words of the Court of Queen's Bench, in speaking of that in *Collins v. Blantern*, no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion (*d*); if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe (*e*).¹

(*b*) 1 M. & Gr. (39 E. C. L. R.) 747.

(*c*) *Fivaz v. Nicholls*, 2 C. B. (52 E. C. L. R.) 501. But where a just and *bond fide* debt actually exists, even though the transaction between the parties out of which the debt arises possibly involves a criminal liability, as for instance, where the debt is in respect of moneys received but not paid over by the debtor and so possibly embezzled, a threat to prosecute would not it seems necessarily vitiate a subsequent agreement by the debtor to give security for the debt he justly owes: *Flower v. Sadler*, 10 Q. B. D. 572 (C. A.), affirming 9 Ib. 83.

(*d*) *Goodall v. Lowndes*, 6 Q. B. (51 E. C. L. R.) 464; and see *Davies v. London and Provincial Marine Ins. Co.*, 8 Ch. Div. 469; 47 L. J. (Chanc) 511.

(*e*) *Keir v. Leeman*, 6 Q. B. (51 E. C. L. R.) 316.

¹ Thus, no action will lie on a contract to procure the appointment of clerk

Here, however, it is convenient to observe that there are some instances, in which indictments for misde-

of a court, or any office relating to the administration of justice: *Haralson v. Dickens*, 2 Car. L. Rep. 66; *Lewis v. Knox*, 2 Bibb, 453; *Carleton v. Whiteher*, 5 N. H. 196; *Proprietors v. Page*, 6 Ib. 183; or to promote the election of a candidate for office: *Swayze v. Hull*, 8 N. J. 54; *Dearborn v. Bowman*, 3 Metc. 135; *Duke v. Asbee*, 11 Ired. 112. So of the procuring or defeating by improper means or personal influence the passage of an act of the legislature: *Wood v. McCann*, 6 Dana, 366; *Clippinger v. Hepbaugh*, 5 W. & S. 315; or the use of interest to procure the pardon of a convict: *Norman v. Cole*, 3 Esp. 253; *Hatzfield v. Gulden*, 7 Watts, 152.

So, where in contemplation of an assignment for, or composition with creditors, or of bankruptcy, an agreement whereby one creditor is to receive more than the others, cannot, if unknown to the rest, be enforced: *Jackson v. Lomas*, 4 T. R. 169; *Smith v. Cuff*, 6 M. & S. 160; *Baker v. Matlack*, 1 Ashm. 68; *Mann v. Darlington*, 15 Pa. St. 312. (See *Bradshaw v. Bradshaw*, 9 M. & W. 28, and *Hornton v. Riley*, 11 Ib. 492, as to the debtor's right to recover back money so paid, which right is distinguished from the principle *in pari delicto potior est conditio defendentis*, on the ground of advantage being taken of the debtor's circumstances to exercise oppression over him.)

A class of cases, however, should be here referred to as of a constant occurrence. These depend on contracts based on a compromise or compounding of some offence. It is well settled that an agreement to compound a felony will not be enforced, and any security based upon such a consideration will be void; on the other hand, some prosecutions for misdemeanors, as for example, for bastardy: *Holcomb v. Stimpson*, 8 Vt. 144; *Maurer v. Mitchell*, 9 W. & S. 71; *Robinson v. Crenshaw*, 2 Stew & P. 276; or, for assault and battery: *Price v. Summers*, 2 South. 578 (unless when coupled with a riot: *Keir v. Leeman*, 6 Q. B. (51 E. C. L. R.) 308; in error, 9 Ib. (58 E. C. L. R.) 371; or with an intent to kill: *Gardner v. Maxey*, 9 B. Mon. 90), are allowed to be compromised by the parties, and to form a valid consideration for promises based on such compromise. Where, however, the relation of debtor and creditor has existed between the parties, the compromise of prosecutions for secreting property, for obtaining money under false pretences, and the like, is, if not held to form an illegal consideration (as it was in the late case of *Shaw v. Reed*, 30 Me. 105), at least looked upon with the strongest disfavour, as affording a ready instrument to abuse and oppression: *Prough v. Entrioken*, 11 Pa. St. 81. The result of the authorities generally upon this subject appears to be, that where the misdemeanor is one in which the welfare of society is immediately concerned, agreements based upon their compromise will not be sanctioned (and its having been done originally by the leave of the Court makes no difference: *Keir v. Leeman*, 9 Q. B. (58 E. C. L. R.) 394), but the rigor of the rule will be relaxed in proportion as the general welfare ceases to be interested, and the offence and its punishment becomes personal between the parties, and still more as the prosecution loses a criminal complexion, and assumes a civil one. In perhaps the most recent prominent case in England, *Keir v. Leeman*, *supra*, which went on error from the Queen's Bench to the

meanours *may* be compromised. It is well known that a party committing certain private injuries may be in-

Exchequer Chamber, Chief Justice Tindal, in delivering the opinion of the latter tribunal, said, that if the matter were *res integra*, they would have no doubt in holding that any compromise of any misdemeanor, or any public offence, was an illegal consideration to support a promise, and that it was remarkable what very little authority, consisting rather of *dicta* than decision, there was to support such considerations. "We have no doubt that in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so, but we are not disposed to extend this any further." And the current of more recent authorities on this side of the Atlantic, sets strongly against the validity of such considerations: *Clark v. Ricker*, 14 N. H. 44; *Com. v. Johnson*, 3 Cush. 454; *Gardner v. Maxey*, 9 B. Mon. 90.—R.

Where two persons apply to the Governor of the State to be appointed to the same office, and it is agreed that one of them shall withdraw his application and aid the other in procuring the appointment, in consideration of which the fees and emoluments of the office are to be divided between them, such contract is illegal and void: *Gray v. Hook*, 4 N. Y. 449. So no action will lie for services as agent in attending to a claim against the State, before the legislature, agreements in respect to such services being against public policy, and prejudicial to sound legislation; nor can a recovery be had in such a case on a *quantum meruit*, there being no legal service performed: *Harris v. Roof*, 10 Barb. 489. A contract for the sale of the personal influence of the plaintiff to procure the enactment of a private statute for the benefit of the defendant is contrary to public policy and void: *Frost v. Belmont*, 6 Allen, 152; *Rose v. Truax*, 21 Barb. 361; *Gil v. Davis*, 12 La. Ann. 219; *Davison v. Seymour*, 1 Bosw. 88; *Powers v. Skinner*, 34 Vt. 274. Services rendered in obtaining the passages of laws by the legislature may support a claim for compensation when publicly rendered by advocates disclosing their true relation to the subject: *Willey v. Collier*, 7 Md. 273; *Sedgwick v. Stanton*, 14 N. Y. 289; *Bryan v. Reynolds*, 5 Wis. 200; *Brown v. Brown*, 34 Barb. 533. An agreement between a subordinate officer in a custom-house receiving a salary as such and a merchant who claimed the return of certain duties that the former should labour to obtain them for a compensation is illegal and void: *Satterlee v. Jones*, 3 Duer, 102. A promise to pay for services and expenses in procuring a pardon for a convict in the state prison is not illegal or invalid: *Chadwick v. Knox*, 31 N. H. 226; *contra*, *Kribben v. Haycraft*, 26 Mo. 396. A contract not to bid at a judicial sale is void: *Hook v. Turner*, 22 Ib. 333. But not an agreement to purchase jointly and afterwards divide: *M'Minn v. Phipps*, 3 Sneed, 196. A contract for the sale of an office is void as against the policy of the law: *Eddy v. Capron*, 4 R. I. 394. An indemnity against the publication of a libel is void: *Lea v. Collins*, 4 Sneed, 393. And see *Spinks v. Davis*, 32 Miss. 152; *Nichols v. Mudgett*, 32 Vt. 546; *Devlin v. Brady*, 32 Barb. 518; *Morrell v. Quarles*, 35

dicted, as for a misdemeanour, as well as sued in a civil action; a remedy necessary for the party injured, who, if he could proceed by action only, would be in fact remediless in cases where the defendant could not pay the damages recovered. In many such cases it can hardly be admitted that the prosecution is to be considered public, or that the public interest is concerned in bringing such an offender to justice by way of example [*234] to others. *Substantially, the only one who suffers by the wrong is the individual against whom it is committed. In instances of this kind, the law does not forbid a compromise between the injurer and the injured. "The law," says the Court of Queen's Bench, in *Keir v. Leeman* (*f*), "will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." The law will therefore sanction a bond, conditioned to remove a public nuisance, founded on the abandonment of an indictment for that nuisance, which is in fact a very common instance of compromise (*g*). The compromise of indictments for assaults is another frequent instance of the same rule (*h*). But if, as in *Keir v. Leeman*, the offence is not confined to personal injury, but is accompanied with riot and the obstruction of a public officer in the execution of his duty, these are matters of pub-

(*f*) 6 Q. B. (51 E. C. L. R.) 321.

(*g*) *Fallowes v. Taylor*, 7 T. R. 475.

(*h*) *Baker v. Townsend*, 7 Taunt. (2 E. C. L. R.) 422.

Ala. 544; *Cook v. Shipman*, 24 Ill. 614; *Brisbois v. Sibley*, 1 Minn. 230; *Valentine v. Stewart*, 15 Cal. 387; *Tool Co. v. Norris*, 2 Wall. 45.—s.

lic concern, and therefore not legally the subject of a compromise.

To return to the subject of contracts tending to obstruct the course of justice. The case of *Coppock v. Bower* (*i*), in which an agreement to with- [*235] draw an election petition in consideration of a sum of money was held void, is another instance of their illegality. So is the case of *Arkwright v. Cantrell* (*k*), where the grant of a judicial office to a person interested in the matters which would become the subjects of adjudication, was held void. For a similar reason, contracts to induce voters, for any consideration of advantage to themselves, to vote in favour of a particular candidate, are illegal and void. Thus, when a candidate himself makes a contract with any one to supply meat and drink to electors, it is void; and if the things be supplied, the person supplying cannot recover the price from the candidate (*l*); for, by the policy of the law, the electors should be free to use their own unbiased judgment in selecting the candidate most fit to serve the public as a member of the great council of the nation. Persons who have the right of appointing to public offices of trust or to any favour from the Crown, are bound to use a like discrimination. All agreements, therefore, to pay money for an appointment to any public office of trust, or for the grant of any public favour, are illegal (*m*).¹

(*i*) 4 M. & W. 361, *ante*, p. *18.

(*k*) 7 Ad. & E. (34 E. C. L. R.) 365. See *Dimes v. Grand Junction Canal Co.*, 3 H. L. C. 759. A very remarkable case.

(*l*) *Thomas v. Edwards*, 2 M. & W. 218.

(*m*) *Parsons v. Thompson*, 1 H. Bl. 322; *Hopkins v. Prescott*, 4 C. B. (56 E. C. L. R.) 578; *Harrington v. Du Chatel*, 1 Bro. C. C. 124; *Græme v. Wroughton*, 24 L. J. (Ex.) 265; *Corp. of Liverpool v. Wright*, 28 L. J. (Ch.) 868.

¹ *Frost v. Belmont*, 6 Allen, 152; *Tool Company v. Norris*, 2 Wall. 45.—s.

[*236] *Agreements to indemnify persons against the consequences of illegal acts fall within the same rule as contracts directly to obstruct the administration of justice (*n*)¹ So also do all promises which are made to obtain release from duress of person by illegal arrest, or under compulsion of colourable legal process, whereby it is made the instrument of oppression or extortion; but not where the arrest was legal (*o*); and for similar reasons money extorted by duress of the plaintiff's goods, and paid by him under protest, may be recovered back (*p*).²

(*n*) *Shackell v. Rosier*, 2 Bing. N. C. (29 E. C. L. R.) 634. A contract with one who becomes bail for another on a criminal charge to indemnify him against his liability as bail is illegal as being against public policy. *Wilson v. Strugnell*, 7 Q. B. D. 548; 50 L. J. (M. C.) 145.

(*o*) See *The Duke de Cadaval v. Collins*, 4 A. & E. (31 E. C. L. R.) 858; *Cummings v. Hooper*, 11 Q. B. (63 E. C. L. R.) 112; *Johnson v. Royal Mail Steam Packet Company*, L. R. 3 C. P. 38; 37 L. J. (C. P.) 33.

(*p*) *Ashmole v. Wainwright*, 2 Q. B. (42 E. C. L. R.) 837; *Wakefield v. Newton*, 6 Q. B. (51 E. C. L. R.) 276; *Fernley v. Branson*, 20 L. J. (Q. B.) 178.

¹ *Mitchell v. Vance*, 5 Mon. 529; unless the illegal act is *already done*, in which case, the agreement to indemnify is no encouragement to do *future* harm: *Hackett v. Tilly*, 11 Mon. 93; *Kneeland v. Rogers*, 2 Hall, 587. Thus a bond given to a sheriff to indemnify him against a voluntary escape which *had* happened is valid, though if given in anticipation of such an escape it would fall within the general rule: *Given v. Diggs*, 1 Cai. 450; *Doty v. Wilson*, 14 Johns. 381; and these cases, it will be perceived, are analogous in principle to those which, while holding to be invalid bonds executed in consideration of a *future* separation between husband and wife, yet enforce such instruments where the separation is to be immediate, or has already taken place.—R.

An agreement to indemnify a sheriff for an act to be done by him in plain violation of his official duty, is invalid; but such an agreement, in the case of a disputed right, is lawful: *Shotwell v. Hamblin*, 23 Miss. 156.—S.

² It is no objection to the validity of a contract fairly entered into, where no advantage was sought or taken by the other party, that at the time of entering into it he was under arrest; but where legal process has been used as a means of oppression and to extort disadvantageous terms from a party in custody, instruments in writing so obtained will be set aside: *Stebbins v. Niles*, 25 Miss. 267; *Wells v. Barnett*, 7 Tex. 584; *Smith v. Atwood*, 14 Ga. 402. A note given by a person lawfully imprisoned, in order to procure his discharge, is not invalid as being given under duress: *Bates v. Butler*, 46 Me. 387.

Maintenance and champerty are so often talked of as contracts having an illegal object and consideration, that they seem to require a slight allusion here. Maintenance consists in one who has no interest in the subject of a suit, and no just right to interfere in it, aiding by money or otherwise the parties interested. This is forbidden by the law, whose policy has always been to discourage *disputes and litigation. A contract therefore with such an object is [237] void; but a man who has an interest in the cause, or reasonably thinks he has, is not guilty of maintenance if he prosecutes it in common with others, and his agreement so to do is good (*q*). If a person, having no interest in a suit, interferes with the object of sharing in the fruits of the suit, this is champerty (*r*). If, therefore, an attorney agrees not to charge his client costs, in consideration of having for himself a proportion of what he may recover for him, this agreement is champerty, and consequently illegal and void (*s*).¹ If

(*q*) *Findon v. Parker*, 11 M. & W. 675. See also as to an action for maintenance lying against the maintainer: *Bradlaugh v. Newdegate*, 11 Q. B. D. 1; 52 L. J. (Q. B.) 454.

(*r*) *Williams v. Protheroe*, 3 Y. & J. 129; *Stanley v. Jones*, 7 Bing. (20 E. C. L. R.) 369; *Hilton v. Woods*, 36 L. J. (Ch.) 941.

(*s*) *Re Masters*, 4 D. P. C. 18, per *Coleridge, J.*; *ex parte Yeatman*, Ib. 384; *Earle v. Hopwood*, 30 L. J. (C. P.) 217.

As to duress of imprisonment see *Phelps v. Zuschlag*, 34 Tex. 371; *Feller v. Green*, 26 Mich. 70. An employment of criminal process to obtain civil redress is a misuse of process and a fraud upon the law; and securities procured under the pressure of such a proceeding, by the party promoting it, cannot be enforced: *Seiber v. Price*, 26 Mich. 518. An arrest under a legal warrant if the object is to extort money or to coerce the settlement of a civil claim constitutes duress: *Hackett v. King*, 6 Allen, 58.

As to duress *per minas* see *Green v. Scranage*, 19 Iowa, 461; *Tapley v. Tapley*, 10 Minn. 448; *Bane v. Detrick*, 52 Ill. 19; *Thurman v. Burt*, 53 Ib. 129; *Bosley v. Shanner*, 26 Ark. 280; *Knapp v. Hyde*, 60 Barb. 80; *Miller v. Miller*, 68 Pa. St. 486; *Plant v. Gunn*, 2 Wood, 372; *Smith v. Rowley*, 66 Barb. 502.

As to duress of property see *Spaids v. Barrett*, 57 Ill. 289; *Hibbard v. Mills*, 46 Vt. 243.—s.

¹ Upon the subject of "contingent fees" the law is not uniform throughout

no suit be depending, or any stipulation for the commencement of one, a contract to supply documents and information whereby property may be recovered, in consideration of a share of the property when recovered, is legal. But if persons, having themselves no claim

the various States. Perhaps it is a fair statement of the preponderating opinion of the better class of the profession to say that while it is generally recognized that cases may arise in which a lawyer is warranted in undertaking the case of a client who will be unable to compensate him unless successful in the suit, because a refusal might result in a failure to establish a just claim and a practical denial of justice to the suitor, still such engagements are to be entered into with extreme caution. The practice of taking cases as a general rule upon an agreement that compensation is to be contingent upon success would be generally condemned. See Judge Sharswood's "Professional Ethics" upon this subject, and also an interesting controversy in the Albany Law Journal (vol. 23, pp. 441, 479, 484, and vol. 24, pp. 4, 18, 24).

As to the legality, as distinguished from the policy and morality, of the practice, we find that while such arrangements have sometimes been held champertous, and while they are always regarded with disfavour by the Courts, they have been sustained in some States. In the most recent case in Pennsylvania, the legality of such contracts in that State is said to be well settled: *Perry v. Dicken*, 14 W. N. C. 245. On the other hand, Chief Justice Gray, in the case of *Ackert v. Barker*, 131 Mass. 436, cites the Massachusetts decisions, and after declaring upon their authority that such contracts are void, he goes on to say: "The law of Massachusetts being clear, there would be no propriety in referring to the conflicting decisions in other parts of the country. If it is thought desirable to subordinate the rules of professional conduct to mercantile usages, a change of our law in this regard must be sought from the Legislature, and not from the Courts." Other important American cases are discussed in the articles in the Albany Law Journal above referred to, and see also Weeks, *Attorneys at Law*, §§ 350, *et seq.*

In *County of Chester v. Barber*, 97 Pa. St. 455, Paxson, J., said: "That an attorney may make any contract he sees proper with his client in regard to his compensation, where the client is a private citizen, and acting in his own behalf, is not denied. All that the law will do in such case is to scrutinize the transaction and see that it is fair and that no unconscionable advantage has been taken either of the necessities or the ignorance of the client." The burden is upon the attorney to show the fairness of the transaction: *Nesbit v. Lockman*, 34 N. Y. 167; *Hitchings v. Van Brunt*, 38 Ib. 335. As to whether the fact that a champertous agreement has been made between the plaintiff and his attorney can be urged as a defence to the action, the decisions are conflicting. The weight of authority would seem to be against it. See *Courtright v. Burnes*, 2 McCrary, 532; *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Allison v. Railroad*, 42 Iowa, 274; *Robinson v. Beall*, 26 Ga. 17; *sed contra*, *Greenman v. Cohee*, 61 Ind. 201; *Barker v. Barker*, 14 Wis. 142; *Webb v. Armstrong*, 5 Humph. 379; *Morrison v. Deaderick*, 10 Humph. 342.

on the property, agree with a claimant that legal proceedings shall be instituted in his name to recover it, and they will supply him with documents, information, and evidence not specified, but such evidence as will enable him to recover it, and to be rewarded with a share when *recovered, this is maintenance in its worst aspect (*t*). And where, in considera- [*238] tion that the plaintiff would take the necessary steps to contest a will, and would advance money and obtain evidence for such purpose, and instruct an attorney, defendant promised plaintiff half the property which might come to defendant by reason of such proceedings, this agreement was held void as amounting to champerty; although the plaintiff was a relation of the defendant, and had some collateral interest in the suit (*u*). It is worth observing, that it is mainly for the purpose of avoiding maintenance that the rule of law forbidding the assignment of choses in action was established (*x*), a rule which, as the law admitted the assignee to sue in the name of the assignor was seldom, in practice, allowed to interfere with the liberty required by trade and commerce. The disadvantages, however, of the rule are now obviated by the provisions of the Judicature Act of 1873, to which I shall have occasion again to refer you (*y*)¹

(*t*) *Sprye v. Porter*, 26 L. J. (Q. B.) 64; 7 E. & B. (90 E. C. L. R.) 58; *Simpson v. Lamb*, *Ib.* 121; 7 E. & B. (90 E. C. L. R.) 84; *Knight v. Bowyer*, 26 L. J. (Ch.) 769; 27 L. J. (Ch.) 520; *Anderson v. Radcliffe*, 28 L. J. (Q. B.) 32; S. C. in Ex. Ch., 29 L. J. (Q. B.) 128.

(*u*) *Hutley v. Hutley*, L. R. 8 Q. B. 112; 42 L. J. (Q. B.) 52.

(*x*) Litt. 347; Co. Litt. 214 a; Shep. Touch. 240.

(*y*) See as to the assignment of choses in action, 36 & 37 Vict. c. 66, s. 25, sub-sec. 6; and *post*, LECT. VII., "Assignment of Contracts."

¹ The offence of maintenance seems now to be confined to the intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing litigation: *Dorwin v. Smith*, 35 Vt. 69. An agreement between an attorney

[*239] *All contracts between British subjects and alien enemies, not having a license to trade with this country, are void, and cannot be enforced, even upon the return of peace (z). The sovereign of this country has a right to proclaim war, with all its consequences, enforcing or mitigating them either generally or in particular instances, as may be thought best by the Government. One of these consequences is, that trade and dealing with the enemy, unless expressly permitted, are forbidden. For a British subject, not domiciled in a neutral country, to ship a cargo from an enemy's port is *primâ facie* dealing and trading with the enemy, and therefore forbidden by law; and consequently a contract made before the war, under which it is agreed that a cargo shall be shipped from a port which, by the declaration of war, becomes that of the enemy, is thereby rendered illegal, and no action can be founded upon the fact of its not being performed (a). But if the contract has been made before the war be-

(z) *Kensington v. Inglis*, 8 East, 273. See *Potts v. Bell*, 8 T. R. 548.

(a) *Eposito v. Bowden*, 27 L. J. (Q. B.) 17, in Ex. Ch.; 7 E. & B. (90 E. C. L. R.) 763; *Reid v. Hoskins*, 24 L. J. (Q. B.) 315; 5 E. & B. (85 E. C. L. R.) 729; 26 L. J. (Q. B.) 5; 6 E. & B. (88 E. C. L. R.) 953, in Ex. Ch.

and his client that he shall be first paid out of the funds recovered is not maintenance or champerty: *Christie v. Sawyer*, 44 N. H. 298; *Jordan v. Gilen*, Ib. 424; *Moody v. Harper*, 38 Miss. 599; *Ryan v. Martin*, 16 Wis. 57.—s.

In *Sedgwick v. Stanton*, 4 Kernan, 301, *Selden, J.*, said: "I still think, in view of the manifest tendency of modern judicial opinions, as well as of the plain scope and intent of our Legislature upon the subject, that not a vestige of the law of maintenance, including that of champerty, now remains in this State, except what is contained in the Revised Statutes." See on this subject *Thompson v. Reynolds*, 73 Ill. 11; *Backus v. Byron*, 4 Mich. 535; *Danforth v. Streeter*, 28 Vt. 490; *Voorhees v. Dorr*, 51 Barb. 580; *Sherley v. Riggs*, 11 Humph. 53; *Smith v. Thompson*, 7 B. Mon. 305; *Taylor v. Gilman*, 58 N. H. 417; *Richardson v. Rowland*, 40 Conn. 572; *Hoffman v. Vallejo*, 45 Cal. 564; *Lytle v. State*, 17 Ark. 608.

tween their respective countries began, the parties thereto may sue upon it when peace is restored (b)¹.

Agreements contravening the ends and objects of the enactments of the Legislature, or, as it is *most commonly expressed, the policy of those enactments, are void (c). And this class of illegality is properly arranged with other instances of illegality by the common law, because it does not consist in the breach of any enactment of a statute, but violates the principle of the common law, which is to carry into effect the intent and object of the Legislature. The most common instances of this illegality are afforded by agreements to give a creditor of a bankrupt or insolvent more than his equal share of the bankrupt's or insolvent's estate, which it is the object of the Bankrupt and Insolvent Acts to divide equally amongst his creditors (d). An instance may also be given from the case of *Prole v. Wiggins* (e) where the agreement was to evade the provisions (f) of the Apothecaries Act (55 Geo. III. c. 194, s 15), which required that a student, previously to being admitted to examination for the purpose of obtaining his certificate to practise as an apothecary, should have served an apprenticeship for

(b) *Alcenius v. Nygrin*, 24 L. J. (Q. B.) 19; 4 E. & B. (82 E. C. L. R.) 217.

(c) *Ritchie v. Smith*, 6 C. B. (60 E. C. L. R.) 462.

(d) *Staines v. Wainwright*, 6 Bing. N. C. (37 E. C. L. R.) 174; *Davis v. Holding*, 1 M. & W. 156; *Tabram v. Freeman*, 2 C. & M. 451; *Wilkin v. Manning*, 23 L. J. (Ex) 174; 9 Ex. 575. See *Nerot v. Wallace*, 3 T. R. 17, a very instructive case; *Hills v. Mittson*, 22 L. J. (Ex.) 273; 8 Ex. 751; *Murray v. Reeves*, 8 B. & C. (15 E. C. L. R.) 421; *Humphries v. Smith*, 22 L. J. (Q. B.) 121.

(e) 3 Bing. N. C. (32 E. C. L. R.) 230.

(f) Now repealed by 37 & 38 Vict. c. 34, s. 2.

¹ *Condon v. Walker*, 1 Yeates, 483; *Cambioso v. Moffett*, 2 Wash. C. C. 98; *United States v. Lapéne*, 17 Wall, 601; *Whitfield v. United States*, 92 U. S. 165; *Railey v. Gay*, 20 La. Ann. 158; *Clements v. Yturria*, 14 Hun. 151; *Bank of New Orleans v. Matthews*, 49 N. Y. 12; *Hill v. Spear*, 50 N. H. 253.

five years. Here the father of a student agreed with an apothecary to take his son as an apprentice for two [*241] years, but to antedate the *articles, so that it should seem that he had been apprenticed for the legal term of five years, in order that, at the expiration of two years only, he might be admitted to his examination, and gave the apothecary a bond to secure the payment of a premium stipulated to be given upon such apprenticeship. The Court of Common Pleas, however, held that the bond was clearly void. So, too, an agreement by a shareholder in a company which is being compulsorily wound up, that in consideration of pecuniary equivalent he will endeavour to postpone the making of a call, or will support the claim of a creditor, is illegal, as being contrary to the policy of the Winding-up Acts (*g*).

In the cases lately referred to, so much is said of the policy of the law and public policy, that it is desirable to add a few words in explanation of them. These terms have been used to express an important principle from very early periods (*h*), and one of the most important cases of very modern times has been decided upon grounds of public policy (*i*).¹ They are, however,

(*g*) *Elliott v. Richardson*, L. R. 5 C. P. 744; 39 L. J. (C. P.) 340.

(*h*) *Shep. Touch.* 132; *Co. Litt.* 206 b.

(*i*) *Egerton v. Brownlow*, 4 H. L. C. 1.

¹ There is a disposition, especially in recent cases, to recognize very fully the principle that when parties of full age and in the possession of all their faculties choose to make a bargain which is not strictly illegal and does not involve consequences of positive harm to third parties or to the community generally, the true "policy of the law" is to see that they carry it out. Eminent judges have expressed dissatisfaction at the lengths to which the Courts have gone, and the tendency is, not to allow the doctrine to be pushed further. In *Ricardson v. Mellish*, 2 Bing. (9 E. C. L. R.) 229, Best, C. J., said: "I am not much disposed to yield to arguments of public policy. I think the Court of Westminster Hall (speaking with deference, as an humble individual like myself ought to speak) have gone much further than they were warranted in going in questions of policy: they have taken on themselves, sometimes, to

used indiscriminately in many of the cases, although perhaps the phrase "policy of the law" indicates more correctly the sense in which the terms are used in law, than the words "public policy." Whichever form is *employed, two distinct classes of things are referred to by them. Sometimes they indicate the [*242]

decide doubtful questions of policy; and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy." In *Hilton v. Eckersley*, 6 E. & B. (88 E. C. L. R.) 64, Lord Campbell said: "I enter upon such considerations with much reluctance, and with great apprehension, when I think how different generations of judges, and different judges of the same generation, have differed in opinion upon questions of political economy and other topics connected with the adjudication of such cases. And I cannot help thinking that, where there is no illegality in bonds and other instruments at common law, it would have been better that our Courts of justice had been required to give effect to them unless where they are avoided by Act of Parliament. By following a different course, the boundary between judge-made law and statute-made law is very difficult to be discovered. But there certainly is a large class of decisions which will be found collected in the report of the recent *Bridgewater Case* in the House of Lords (*Egerton v. Earl Brownlow*, 4 H. L. C. 1) to the effect that, if a contract or a will is, in the opinion of the Judges before whom it comes in suit, clearly contrary to public policy, so that by giving effect to it the interests of the public would be prejudiced, it is to be adjudged void." In *Printing and Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 465, Jessel, M. R., said: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further. I do not say there are no other cases to which it does apply; but I should be sorry to extend it much further." And Fry, J., expressed his approval of these remarks in *Rousillon v. Rousillon*, 14 Ch. Div. 365. See *Hill v. Spear*, 50 N. H. 253.

spirit of a law as distinguished from the letter of it; as when it is said that contracts made by a trader, giving a preference to particular creditors, although not forbidden by the letter of any enactment, violate the policy of the bankrupt laws, the first object and policy of those laws being to make a rateable distribution of the bankrupt's property amongst all his creditors (*j*). In this sense the words are also used, when, in construing a particular law, the Judges look at the object and policy with which it was framed, and the evil which it was apparently intended to remove (*k*). They use the policy of a particular law as a key to open its construction.

At other times these expressions indicate a principle of law, which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good (*l*). If this be understood as the public good, recognized and protected by the most general maxims of the law and of the constitution, it furnishes a rule much more general than the first class, yet definite in its terms, and clearly distinguishable from that class of public policy or political expediency which would comprise such questions, as, whether it is wise to have a sinking fund or a paper circulation, and [*243] *which would properly guide the Legislature or the executive government in determining any question which they might have to deal with. It is evident that Courts of Law cannot decide upon these considerations.

It would seem that all the cases which have been decided upon the ground of public policy are referable to one or other of the two classes above mentioned, and perhaps this section of law cannot be summed up in a

(*j*) 4 H. L. C. 87, per *Cresswell*, J.; *Coles v. Strick*, 15 Q. B. (69 E. C. L. R.) 2.

(*k*) *Egerton v. Brownlow*, at p. 107, per *Alderson*, B.

(*l*) *Ib.* 196, per Lord *Truro*.

way more satisfactory to the reader than by quoting the words of *Parker, C. J.*, in the famous case of *Mitchell v. Reynolds (m)*: "All the instances of a condition against law in a proper sense are reducible under one of these heads: 1st, either to do something that is *malum in se* or *malum prohibitum*; 2ndly, to omit the doing of something that is a duty; 3rdly, to encourage such crimes and omissions. Such conditions as these, the law will always, and without regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes." For when the letter of the law forbids to do anything which is *malum in se* or *malum prohibitum*, and prescribes the performance of all which it considers as a duty, it may well be thought that public policy or the policy of the law forbids to do anything which may encourage the wrong or deter from the duty.¹

*The instances which I have mentioned are [*244] those in which illegality at common law is most frequently set up for the purpose of invalidating a contract. To these must be added the third class of cases which I specified; those, namely, in which the contract is avoided on the ground of fraud; that is, deceit practised upon the contracting party in order to induce him to enter into it (*n*). This is so well known a point

(*m*) 1 P. Wms. 189; 1 Smith, L. C. 424, 8th ed.

(*n*) *Evans v. Edmonds*, 22 L. J. (C. P.) 211; 13 C. B. (76 E. C. L. R.) 777; *Bwlch y Plwmhead Mining Co. v. Baynes*, 36 L. J. (Ex.) 183; *Central Railway Company of Venezuela v. Kisch*, 36 L. J. (Ch.) 849; *Ross v. Estates Investment Society*, 36 L. J. (Ch.) 54.

¹ Debts contracted for supplies used in carrying out an illegal contract may be recovered notwithstanding the knowledge of the creditor that the supplies were to be used for such a purpose; but the creditor cannot recover if he did any act in aid of the illegal purpose: *Kottwitz v. Alexander*, 34 Tex. 689. Money loaned to be wagered on a horse-race cannot be recovered: *Alfriend v. Hughes*, 4 Bush, 40; *M'Gavock v. Puryear*, 6 Cold, 34; *Tatum v. Kelley*, 25 Ark. 209.—s.

and one of such continual recurrence in practice, that it is useless to multiply examples of its application. As to the deceit, it may be of an active kind, as falsehood and misrepresentation (*o*) actually used by one party for the purpose of deceiving the other; or it may be passive, as where a vendor knows that a purchaser labours under a delusion, which he also knows is influencing his judgment in favour of purchasing, and suffers him to complete his purchase under that delusion (*p*).¹ The plaintiffs prepared an agreement of guaranty in which they recited a prior [*245] agreement, by which it appeared that they *had already trusted the debtor on the guaranty of A. B., that the debtor had been sometime salesman to them, on the terms that he was to be answerable for the price of the articles sold by him, and to pay for them monthly, and that in order to induce them to continue the arrangement defendant had agreed to give a guaranty as after-mentioned. The agreement then went on to provide that defendant should give a continuing guaranty to plaintiffs for three years, to secure the amount of any balance that might at any time during those years be due to them. But it did not recite, as was the fact, that any debt was then due to them, nor did defendant know it. This agreement was executed by defendant, without making any inquiry. The Ex-

(*o*) *Taylor v. Ashton*, 11 M. & W. 400; *Barley v. Walford*, 9 Q. B. (58 E. C. L. R.) 197; *Barnes v. Pennell*, 2 H. L. C. 497; *Gerhard v. Bates*, 22 L. J. (Q. B.) 367; 2 E. & B. (75 E. C. L. R.) 476; *S. C.*

(*p*) *Hill v. Gray*, 1 Stark. (2 E. C. L. R.) 434. See *Keates v. Lord Cadogan*, 20 L. J. (C. P.) 76; 10 C. B. (70 E. C. L. R.) 591.

¹ A contract to be obligatory must be justly and fairly made. The undue concealment which amounts to a fraud is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right to know. The concealment of facts must be by a party who is under some special obligation, by confidence reposed or otherwise, to communicate them truly: *Mitchell v. McDougall*, 62 Ill. 498.—s.

chequer Chamber considered that there was evidence that plaintiffs had intentionally made a fraudulent misrepresentation to defendant to induce him to sign the agreement (*q*). But that a vendor may go a considerable way towards dishonesty without rendering himself liable to lose the benefit of the contract he has made, is shown by the recent case of *Ward v. Hobbs* (*r*). There the defendant sent for sale to a public market pigs which, according to the finding of the jury, he knew to be infected with a contagious disease; they were exposed for sale subject to a condition that no warranty would be given and no compensation *would be made in respect of any fault. No [*246] verbal representation was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs, which became infected; some of the pigs bought from the defendant and also some of those with which they were put died of the contagious disease. The plaintiff having sued to recover damages for the loss which he had sustained, the Court of Appeal held (reversing the judgment of the Queen's Bench Division), that, although the defendant might have been guilty of an offense against the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 78), s. 57, yet he was not liable to the plaintiff, for that his conduct in exposing his pigs for sale in the market did not amount to a representation that they were free from disease. This judgment of the Court of Appeal was subsequently affirmed by the House of Lords (*s*).

It has sometimes been supposed that there was such a

(*q*) *Lee v. Jones*, 34 L. J. (C. P) 131.

(*r*) 3 Q. B. D. 150; 47 L. J. (Q. B., etc.) 90, reversing 2 Q. B. D. 331, 46 L. J. (Q. B., etc.) 473.

(*s*) *Ward v. Hobbs*, 4 App. Cas. 13; 48 L. J. (Q. B.) 281.

thing as legal fraud, which would invalidate a contract though there was no moral fraud in the transaction. In the recent case of *Joliffe v. Baker* (*t*), this doctrine has been examined at some length, and the conclusion there arrived at is that such a distinction is not maintainable. And **Watkin Williams*, J., in delivering the judgment of the Court in that case, adopts, with regard to the expression of *legal fraud*, the words of *Bramwell*, L. J., in *Weir v. Bell* (*u*), where he says: "I do not understand *legal fraud*. To my mind, it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, except where some duty is shewn and correlative right, and some violation of that duty and right. And when these exist, it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical and unmeaning, with the consequent uncertainty." In order, indeed, to render a representation fraudulent in contemplation of law, "it is not necessary that it should be false to the knowledge of the party making it; if it be untrue in fact, *and not believed to be true* by the party making it, or made recklessly without any knowledge on the subject, and for the purpose of inducing another person to act upon it" (*x*), that will be sufficient to invalidate a contract made on the faith of such a representation (*y*). Still, such conduct on the part of the person making the representation is clearly not free from moral obliquity. The deceit, *moreover, must actually induce the contracting party to

(*t*) 11 Q. B. D. 255; 52 L. J. (Q. B.) 609. See also 2 Smith, L. C., note to *Pasley v. Freeman*, p. 89, 8th ed.

(*u*) 3 Ex. D. 238, 243; 47 L. J. (Q. B.) 704, 707, 708.

(*x*) Note to *Pasley v. Freeman*, 2 Sm. L. C., pp. 89, 90, 8th ed.

(*y*) See note to *Pasley v. Freeman*, *supra*, and the cases cited there, also *Joliffe v. Baker*, *supra*.

enter into the contract. If he contracted, not believing it, or trusting to his own judgment, and not to the representation, he cannot avoid this contract on account of the falsehood (z).¹

(z) *Moens v. Heyworth*, 10 M. & W. 147; *Shrewsbury v. Blount*, 2 M. & Gr. 475, per *Tindal*, C. J. See also the judgment of *Ld. Blackburn* in *Smith v. Chadwick*, 9 App. Cas. 187, 192.

¹ Thus Lord Brougham said, in delivering his judgment in the House of Lords, in the great case of *Attwood v. Small*, 6 Clark & Fin. 232, that the inference he drew from the authorities was that "general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing; unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract. If a mere general intention to overreach were enough, I hardly know a contract, even between persons of very strict morality, that could stand. We generally find the case to be that there has been an attempt of the one party to overreach the other, and the other to overreach the first, but that does not make void the contract." It has therefore been held, that mere general statements of what property would thereafter be worth, afforded no ground for rescission of the contract, the matter being fully within the vendee's own calculation: *Donelson v. Weakley*, 3 Yerg. 178; and so of any other general representation, open to examination: *Strong v. Peters*, 2 Root, 93; *Bell v. Henderson*, 6 How. 311; *Anderson v. Hill*, 12 Sm. & Mar. 683; *Taylor v. Fleet*, 4 Barb. 95; *Foley v. Cowgill*, 5 Blackf. 18. But it must also be observed, that although the subject of the false statement may be one within the vendee's own range of inquiry, yet if the statement is designedly made in order to prevent such inquiry, the rule is otherwise. Thus in *Dobell v. Stevens*, 3 B. & C. (10 E. C. L. R.) 623, in the negotiation of the sale of the lease and good-will of a public-house, a false representation was made by the vendor with respect to the quantity of beer drawn during a certain period. The books were in the house, and it was part of the defendant's case that the plaintiff might have had access to them, but, notwithstanding that fact, the Court of King's Bench held that an action for damages might, under such circumstances, be sustained; and the same principle will be found applied in the case of *Hunt v. Moore*, 2 Pa. St. 107; *Napier v. Elam*, 6 Yerg. 108; *Campbell v. Wittingham*, 5 J. J. Mar. 96; *Buford v. Caldwell*, 3 Mo. 477.

It was said, in perhaps the most recent English case on this subject (*Watson v. Poulson*, 7 Eng. L. & Eq. 588), that "the telling an untruth, knowing it to be an untruth, with intent to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage, fulfil all the requisites to support an action for deceit."

But a contract induced by fraud is not void, but voidable only at the option of the party defrauded (*a*).

(*a*) See per *Crompton, J.*, in *Clarke v. Dickson*, E. B. & E. (96 E. C. L. R.) 148, 154; 27 L. J. (Q. B.) 223, 226; *Oakes v. Turquand*, L. R. 2 H. of L. 325; 36 L. J. (Ch.) 949; *Urquhart v. Macpherson*, 3 App. Cas. 831; *Benjamin on Sales*, Bk. III. c. 2, ss. 1, 2, pp. 385, 393, 3rd ed.

The question then arises, how much *less*, if anything, than this will be sufficient for that purpose?

The recent cases in England (of *Collins v. Evans*, 5 Q. B. (84 E. C. L. R.) 820; *Moens v. Heyworth*, 10 M. & W. 147; *Taylor v. Ashton*, 11 Ib. 401; and *Ormerod v. Huth*, 14 Ib. 651, the doctrine of which cases was approved in the Exchequer Chamber, in *Barley v. Walford*, 9 Q. B. (58 E. C. L. R.) 197) have now decisively settled, in accordance with reason and previous authority, that in order to support an action on the case for fraudulent representations, it is not sufficient to show that a party made statements which he did not know to be true, and which were in fact false. Thus, in *Evans v. Collins* (when in the Court of Queen's Bench), the defendants having pleaded that they had reasonable and probable cause to believe, and did believe, their representation to be true, viz., as to the identity of a particular person who was to be arrested on a *capias*, the jury found for them on that plea, and when the Court (which in the previous case of *Fuller v. Wilson*, 3 Q. B. (43 E. C. L. R.) 58 (reversed in the Exchequer Chamber, on another point in Ib. 68, 1009), had taken a different view from that entertained by the majority of the Court of Exchequer) entered judgment for the plaintiffs, *non obstante veredicto*, that judgment was reversed by the Exchequer Chamber, which held that the verdict on the issue raised by that plea was material; and the propriety of the reversal seems to have been, in the recent case of *Barley v. Walford*, 9 Q. B. (58 E. C. L. R.) 205, acquiesced in by Lord Denman, who had delivered the opinion which was reversed. "We must admit," said he, "the reasonableness of the doctrine there at length laid down. For if every untrue statement which produces danger to another would found an action at law, a man might sue his neighbour for any mode of communicating erroneous information, such, for example, as having a conspicuous clock too slow, since the plaintiff might be thereby prevented from attending to some duty or acquiring some benefit. A doctrine creating legal responsibility in cases so numerous and so free from blame must be restrained within some limits." Hence the result of these authorities is, that in order to make a party liable on the ground of fraud, there must be fraud as distinguished from mere mistake, and to such a conclusion the reason and weight of American authority also tends: *Russell v. Clark*, 7 Cranch, 69; *Young v. Covell*, 8 Johns. 25; *Hammatt v. Emerson*, 27 Me. 309; *Weeks v. Burton*, 7 Vt. 67; *Ewings v. Calhoun*, Ib. 79; *Lord v. Colley*, 6 N. H. 99; *Allen v. Addington*, 7 Wend. 10; 11 Ib. 375; *Tryon v. Whitmarsh*, 1 Metc. 1; *Ball v. Sively*, 1 Dana, 370; *Smith v. Babcock*, 2 W. & M. 246; and in a recent case, which has appeared while these sheets are going through the press, the Supreme Court of the United States have distinctly affirmed the

This being so, it is valid until rescinded where the rights of third parties intervene (*b*) ; and therefore in the case

(*b*) See per Ld. Colonsay in *Oakes v. Turquand*, L. R. 2 H. of L. 375 ; 36 L. J. (Ch.) 976.

same doctrine, after most of the late English decisions referred to had been cited in argument. "The gist of the action," said the Court, "is fraud in the defendants, and damage to the plaintiff. Fraud means an intention to deceive. If there was no such intention, if the party honestly stated his own opinion, believing, at the same time, that he stated the truth, he is not liable in the form of action, although the representation turned out to be entirely untrue." Lord *et al. v. Goddard*, 13 How. 198-211.

The position of a defendant may, however, be such, that without the utterance of what is known to him to be an actual falsehood, he may still be liable in an action for deceit, viz., where he states material facts *as of his own knowledge* (and not as mere matter of opinion or general assertion) about which he has *no knowledge whatever*. Here it is held that this direct wilful statement, in ignorance of the truth, is the same as the statement of a known falsehood, and will constitute a *scienter*: *Hazard v. Irwin*, 18 Pick. 96 ; *Lobdell v. Baker*, 1 Metc. 193 ; s. c. 3 Ib. 469 ; *Stone v. Denny*, 4 Ib. 158 ; *Medley v. Watson*, 6 Ib. 247 ; *Daniel v. Mitchell*, 1 Story, 172 ; *Dogget v. Emerson*, 3 Ib. 700 ; *Mason v. Crosby*, 1 W. & M. 342 ; *Hammitt v. Emerson*, 27 Me. 308 ; *Gough v. St. John*, 16 Wend. 646 ; *Thomas v. M'Cann*, 4 B. Mon. 601 ; *Buford v. Caldwell*, 3 Mo. 477 ; *Lockridge v. Foster*, 4 Scam. 570 ; *M'Cormick v. Malin*, 5 Blackf. 509 ; *Joice v. Taylor*, 6 Gill & J. 54 ; *Munroe v. Pritchett*, 16 Ala. 785.

Such a course of decision perfectly accords with the remark of Judge Story, that "the affirmation of what one *does not know or believe to be true*, is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false ;" while it is not at all inconsistent with the language quoted from *Ormrod v. Huth*, that "if the representation was honestly made, and *believed at the time to be true* by the party making it, although not true in point of fact, it is not a fraudulent representation." The question of good faith is one, upon the evidence, for the jury : *Lord v. Colley*, 6 N. H. 99 ; *Bokee v. Walker*, 14 Pa. St. 139 ; and the plaintiff can recover, either by showing the positive statement and the defendant's knowledge of its falsity, or by showing the positive statement and proving that the defendant had not, and could not have had, any knowledge in the matter. Either of these presents a case of moral fraud, and both of them are very different from that of a statement false indeed in fact, yet honestly believed to be true.

It would seem, however, that even in the latter case, there is no principle of law which forbids a defendant being made liable in an action on the case for *negligence*, which entirely meets the objection entertained by the English editor to the course adopted by the latest English decisions. Had the declaration in *Taylor v. Ashton*, *supra*, been framed with this view, the plaintiff might, upon the verdict of the jury, have recovered. But *volenti non fit injuria*,

of a sale of goods, "though a seller is induced to sell by the fraud of the buyer, and though it is competent to the seller, by reason of such fraud, to avoid the contract, yet till he does some act to avoid it, the property remains in the buyer, and if he in the meantime has parted with the thing sold to an innocent purchaser, the title of the latter cannot be defeated by the original seller" (c). The case *of *Moyce v. Newington*, [*249] from which this quotation is taken is a good illustration of this rule. There, one *Wale* purchased

(c) Per *Cockburn*, C. J., in *Moyce v. Newington*, 4 Q. B. D. 32, 35; 48 L. J. (Q. B.) 125, 127. See also per *Blackburn*, J., in *Lindsay v. Cundy*, 1 Q. B. D. 348, 355; 45 L. J. (Q. B.) 381, 384.

and if the purchaser knew the exact situation of the subject of the representation at the time it was made to him, he cannot, of course, recover damages on the ground of having been deceived by it.

Between the *allegatio falsi* and the *suppressio veri* there is only this distinction, that the non-disclosure, in order to constitute fraud, must be of facts which the seller was under obligation to disclose: 1 *Story's Eq.*, § 207. Thus, where provisions are sold for home consumption which are known by the seller to be unsound, he will be liable for a deceit, upon proof of his knowledge, independently of any representation made by him: *Van Bracklin v. Fonda*, 12 Johns. 468; *Emerson v. Brigham*, 10 Mass. 197; and it may be said, in general, that any course of dealing calculated to create a false impression on the purchaser, will amount to a fraud: *Misner v. Granger*, 9 Ill. 69; *Young v. Bumpass*, 1 Freeman's Ch. 241; *Bean v. Herrick*, 12 Me. 262; *Early v. Garrett*, 9 B. & C. (17 E. C. L. R.) 928; as where the seller should state facts which were true in themselves, but so expressed as to give the idea that they conveyed the whole truth, while a material fact is kept back: *Allen v. Addington*, 7 Wend. 10; s. c. 11 Ib. 75; *Kidney v. Stoddard*, 7 Metc. 252.

In Lord St. Leonards' latest original work, "The Law of Property as Administered in the House of Lords," will be found collected the late important cases before that tribunal as to the rescission of executed contracts of real estate on the ground of fraud. These are also noticed, together with the American cases on the same subject, in *Rawle on Covenants for Title*, ch. xiii., while to the American annotations to *Chandelor v. Lopus*, 1 Smith's L. C. 294, and *Pasley v. Freeman*, 2 Ib. 146, the student may be profitably referred upon the more immediate subject of which this note has attempted to treat.

The student will find the authorities upon the subject of contracts voidable in equity by reason of undue influence, in the notes to the case of *Huguenin v. Baseley*, 2 W. & T. Eq. Ca. 37-75. Those upon the subject of drunkenness are referred to *infra*.—R.

and obtained delivery of certain sheep from the defendant by means of giving a fictitious cheque. Before the defendant had done anything to avoid the contract with Wale, the latter sold them to the plaintiff, who purchased them *bonâ fide* and for value. It was held that the defendant was not entitled to take away the sheep from the plaintiff, as he had done, but was liable to him in an action for their value for so taking them (*d*). This class of cases is to be distinguished from *Lindsay v. Cundy*, already referred to (*e*). There, there was no contract at all. In the cases illustrating the rule now under discussion there *was* a contract, valid until set aside by the active intervention of the party imposed upon. The preference given to the right of the innocent purchaser seems to be based on the principle that where one of two innocent persons must suffer from the fraud of the third, the loss should fall on the one who enabled the third party to commit the fraud (*f*).

*We next come to that class of contracts which are void because infected with illegality, [*250] existing not by the rules of Common Law, but under the express provisions of some statute.

Now, with regard to this class, I need hardly say that no contract prohibited by the *express* provisions of a statute can be enforced in any Court of law; but it is necessary that you should also bear in mind that an *implied* prohibition is equally fatal to its validity.

"Where a contract," says Lord *Tenterden*, in *Wetherell v. Jones* (*g*), "is *expressly* or by *implication* forbid-

(*d*) *Moyce v. Newington*, 4 Q. B. D. 32; 48 L. J. (Q. B.) 125. See also *Attenborough v. St. Katharine's Dock Co.*, 3 C. P. D. 450; *Babcock v. Lawson*, 4 Q. B. D. 394; 5 Ib. 284; 48 L. J. (Q. B.) 524; 49 Ib. 408.

(*e*) *Ante*, p. *156.

(*f*) See the remarks of *Cockburn*, C. J., in *Moyce v. Newington*, 4 Q. B. D. 32, 35; 48 L. J. (Q. B.) 125, 127; and in *Babcock v. Lawson*, 4 Q. B. D. 394, 400, 401; 48 L. J. (Q. B.) 524, 528.

(*g*) 3 B. & Ad. (23 E. C. L. R.) 221.

den, no Court will lend its assistance to give it effect." Thus, where a ship which was to sail from a British port in North America to a port in the United Kingdom between the 1st of September and the 1st of May, had part of her cargo loaded on the deck, which was forbidden by 16 & 17 Vict. c. 107, ss. 170, 171, and 172, and the owners, knowing these things, insured the cargo and the freight, the whole voyage was held illegal, and the owners were not permitted to recover the insurance (*h*). The examples which most commonly occur in practice of implied prohibition are in cases in which an Act does not *in express terms* enact that a particular thing shall not be done, but imposes a penalty [*251] *upon the person doing it. In such cases the imposition of the penalty is invariably held to amount to an implied prohibition of the thing itself on the doing of which the penalty is to accrue. In *Bartlett v. Viner* (*i*), which is always referred to as a standard authority on this subject, *Holt*, C. J., says, "Every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute."¹

(*h*) *Cunard v. Hyde*, 2 E. & E. (105 E. C. L. R.) 1, 29 L. J. (Q. B.) 6. These provisions have been repealed by 39 & 40 Vict. c. 36, s. 288. See now as to deck cargo, 39 & 40 Vict. c. 80, s. 24.

(*i*) *Carth.* 252; *Cope v. Rowlands*, 2 M. & W. 157; *Cundell v. Dawson*, 4 C. B. (56 E. C. L. R.) 396.

¹ *Vining v. Bricker*, 14 Ohio St. 331; *Bemis v. Becker*, 1 Kan. 226. When a contract to do something which is prohibited by law has been executed, the party in possession of the profits arising out of the unlawful acts, will not be allowed to set up the illegality of the subject-matter of the contract as a defence to an action of account thereon: *Gilliam v. Brown*, 43 Miss. 641. As to the ratification of fraudulent contract, see *Pearsoll v. Chapin*, 44 Pa. St. 9; *Cobb v. Hatfield*, 46 N. Y. 533.—s.

According to this principle, where a statute reciting the inconvenience which happened by watermen taking apprentices before they were housekeepers, enacted that it should not be lawful for any waterman to take or keep any apprentice unless he should be the occupier of some house or tenement, wherein to lodge the said apprentice and himself, and that he should keep such apprentice in the same house or tenement wherein he himself should lodge, on pain of forfeiting £10 for every offence, the Court of King's Bench decided that any contract to take an apprentice, entered into by such waterman not being an occupier of some house or tenement, as required by the Act, was prohibited; and, consequently, that *a pauper who had bound himself by indenture to serve such a waterman un- [*252] provided with the required accommodation, and had served under it as apprentice, gained no settlement by such binding and service (*k*). For the same reason, a statute having required that with all coals delivered in London above a certain quantity, the seller should deliver a certain ticket, and in case of not delivering the ticket, should for every offence forfeit a sum not exceeding £20, the seller of a quantity of coals, who had omitted to deliver a ticket with them to his customer, was held not to be entitled to sue him for the price (*l*). The statute 6 Anne, c. 16, requires all brokers within the City of London to be admitted by the Court of Mayor and Aldermen, and provides that if any one shall act as broker, not having been so admitted, he shall forfeit to the use of the Mayor, Aldermen, and Citizens £25 for every offence (*m*). It has been de-

(*k*) *King v. Inhabitants of Gravesend*, 3 B. & Ad. (23 E. C. L. R.) 240.

(*l*) *Cundell v. Dawson*, 4 C. B. (56 E. C. L. R.) 376.

(*m*) This portion of 6 Anne, c. 16, is repealed by 57 Geo. 3, c. 1x, s. 2, and a penalty of £100 substituted. But after the 29th of Sept., 1886, the admission of brokers by the Court of Mayor and Aldermen will be no longer necessary.

cided that a broker not so admitted cannot recover his commission for work done by him as a broker (*n*). In [*253] *the case of a pawnbroker who had not made entries required by the Pawnbrokers' Act, it was held that he had not even a lien on the goods whereon he had advanced money, although the statute merely provided that this neglect should subject him to a penalty (*o*). And an agreement made between a licensed victualler, who kept an hotel, to let the cellar in his house, wherein another was to retail liquors without any license, was held void, although the statute requiring the license merely enacted that any person who should sell excisable liquor by retail without a license, should forfeit from £5 to £20 (*p*). So, too, where stat. 36 Geo. III. c. 86 (*q*), to prevent abuses and frauds in the packing, weight, and sale of butter, enacted in s. 2, that on every vessel for packing butter the maker's name and the exact weight of the vessel should be branded, and imposed a fine on the maker in default; and in s. 3, enacted that every dairyman, farmer, &c., who should pack any butter for sale, should pack the same in vessels properly branded and should mark his name on different parts of the vessel therein described, and on [*254] the butter contained in such *vessel, on penalty of forfeiting for every default £5: it was held, that a sale of butter in vessels not properly branded was prohibited under the Act, and consequently that the contract of sale was void, and the plaintiff in an action for the price of butter sold by him in such vessels could

See 47 & 48 Vict. c. 3 (London Brokers Relief Act, 1884), s. 2. S. 3 of the same Act repeals as from the same date the penalty of £100.

(*n*) *Cope v. Rowlands*, 2 M. & W. 149; *Smith v. Lindo*, 27 L. J. (C. P.) 196; 4 C. B. (N. S.) (93 E. C. L. R.) 395; 27 L. J. (C. P.) 335; 5 C. B. (N. S.) (94 E. C. L. R.) 587, in Ex. Ch.

(*o*) *Fergusson v. Norman*, 5 Bing. N. C. (35 E. C. L. R.) 76.

(*p*) *Ritchie v. Smith*, 6 C. B. (60 E. C. L. R.) 462.

(*q*) Now repealed by 7 & 8 Vict. c. 48.

not recover (*r*). The cases decided upon this principle are very numerous, but these instances have been selected because, while they illustrate the subject, they at the same time show how very many ordinary affairs, if not transacted in the manner prescribed by law, may be forbidden no otherwise than by the imposition of a penalty.¹

Before leaving this subject, it will be convenient to advert to a distinction, in cases of this sort, between acts which are prohibited for the public advantage, and such as are prohibited for purposes of revenue; for it has been sometimes thought, that, in the latter class of instances, the only consequence is to make the person committing such acts liable to the penalty, and not to make his contract unavailable (*s*). But, it may safely be laid down, notwithstanding some dicta apparently to the contrary, that, if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so had in *view the pro- [*255] tection of the revenue or any other object (*t*). The sole question is whether the statute means to prohibit the contract. Thus, where the 25th and 26th sections of the Excise License Act, 6 Geo. IV. c. 81, subject to penalties any manufacturer of, or dealer in, or seller of tobacco, who shall not have his name

(*r*) *Forster v. Taylor*, 5 B. & Ad. (27 E. C. L. R.) 887.

(*s*) *Forster v. Taylor*, 5 B. & Ad. (27 E. C. L. R.) 887; *Taylor v. Crowland Gas Co.*, 23 L. J. (Ex.) 254; 10 Ex. 293.

(*t*) *Cope v. Rowlands*, 2 M. & W. 149.

¹ See *Buxton v. Hamblen*, 32 Me. 448; *Boutwell v. Foster*, 24 Vt. 485; *Beman v. Tugnot*, 5 Sand. 153.—s.

See also *Woods v. Armstrong*, 54 Ala. 150; *Commonwealth v. Shattuck*, 4 Cush. 141; *Smith v. Arnold*, 106 Mass. 435; *Prescott v. Battersly*, 119 Mass. 285; *People v. Albany*, 11 Wend. 539; *Griffith v. Wells*, 3 Den. 226; *Roby v. West*, 4 N. H. 289; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Fowler v. Scully*, 72 Ib. 456; *Thorne v. Ins. Co.*, 80 Ib. 15; *Elkins v. Parkhurst*, 17 Vt. 105.

painted on his entered premises in manner therein mentioned, or who shall manufacture, deal in, retail, or sell tobacco, without the license required for that purpose, it was considered that these enactments do *not* avoid a contract of sale of tobacco made by a manufacturer or dealer who has not complied with the requisites of these sections: their effect is merely to impose a penalty on the offending party for the benefit of the revenue. "The question is," said *Alderson, B.*—"Does the Legislature mean to prohibit *the act done*, or not? If it does, whether it be for the purposes of revenue or otherwise, then the doing of the act is a breach of the law, and no action can arise out of it. But here the Legislature has merely said, that where a party carries on the trade or business of a dealer in or seller of tobacco, he shall be liable to a certain penalty if the house in which he carries on the business shall not have his name, &c., painted on it, in letters publicly visible and legible, and at least an inch long, and so forth. He is liable to the penalty, therefore, by [*256] *carrying on the trade in a house in which these requisites are not complied with; and there is no addition to his criminality if he makes fifty contracts for the *sale* of tobacco in such a house. It seems to me, therefore, that there is nothing in the Act of Parliament to prohibit every act of sale, but that its only effect is, to impose a penalty for the purpose of the revenue on the carrying on of the trade without complying with its requisites" (*u*).

Now the general principle upon which all cases of statutable illegality depend, being as above laid down, it is necessary that you should bear in mind a practical distinction which exists between this class of contracts—contracts I mean, forbidden by the *express* or *implied*

(*u*) *Smith v Mawhood*, 14 M. & W. 452.

enactment of some statute—and another class, in which the *contract* itself does not violate the statute, but some *incidental illegality* occurs in carrying it into effect. In these latter cases the contract is good, and may be made the subject-matter of an action, notwithstanding the breach of the law which has occurred in carrying it into effect.¹

The best mode of explaining this is by an example. In *Wetherell v. Jones* (x), a rectifier of spirits brought an action against a confectioner to recover the price of spirits sold and delivered to *him. The defence [*257] relied upon was illegality. It appears, that, under the Excise Acts, a rectifier or distiller, when he sends out spirits, is bound to send with them a permit truly specifying their strength. The plaintiff had sent a permit but it did not specify the true strength; and the defendant relied on this violation of the statute as an avoidance of the contract. But the Court held that the illegality was not in the contract to sell the spirits, but in the subsequent act of removing them without a proper permit, and, therefore, that an action was maintainable upon the contract; and Lord *Tenterden's* judgment sets the distinction in a very clear light: “We are of opinion,” said his lordship, “that the irregularity

(x) 3 B. & Ad. (23 E. C. L. R.) 221. See also *Smith v. Mawhood*, *supra*.

¹ The mere knowledge on the part of the lender, that the borrower of the legal currency of another State intended to use it in the State of New York, where its circulation was prohibited, would not so far vitiate a contract made in the State where it would be valid, as to authorize the courts of the latter State to refuse to enforce it: *Merchants' Bank v. Spalding*, 12 Barb. 302. A., not owning any Canton stock, employed B., a broker, who owned some, to sell for him two hundred shares at sixty-six dollars a share, deliverable at B.'s option, at any time within thirty days, and deposited with B. \$750 to protect him against loss. The broker contracted to sell at that rate, and notified A., and within the term limited, bought and delivered stock in execution of the contract. Held, that the money was advanced to be used for an illegal purpose, and could not be recovered back: *Staples v. Gould*, 5 Sand. 411.—s.

of the permit, though it arises from the plaintiff's own fault, and is a violation of the law by him, does not deprive him of the right of suing upon a contract, which is *in itself* perfectly legal (*y*), there having been no agreement, express or implied, in that contract, that the law should be violated by such improper delivery. Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no Court will lend its assistance to give it effect; and there are numerous cases in the books in which an action on a contract has failed, because either the consideration for the *promise [*258] or the act to be done was illegal, as being against the express provisions of the law or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law not contemplated by the contract in the performance of something to be done on his part."

Where, moreover, a contract is to do a thing which cannot be performed without a violation of the law, it is void whether the parties knew the law or not. But in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law (*z*). And a foreigner who sold and delivered goods abroad to a *British* subject, knowing at the time the buyer intended to smuggle them into this country, was allowed to recover the price here; not merely on the ground that the subject of a foreign country is not bound

(*y*) It seems, that, by a subsequent statute, he would in this case be deprived of the right of suing: 2 Will. 4, c. 16, ss. 11, 12.

(*z*) *Waugh v. Morris*, L. R. 8 Q. B. 202, 42 L. J. (Q. B.) 57.

to pay allegiance or respect to the revenue laws of this, but also because the plaintiff took no actual part in the illegal act, and it was not a contract of which the smuggling was an essential part, for the buyer might have changed his mind the next day (a).

*With regard to the distinction of which I [259] have been speaking [*viz.*, where an incidental illegality occurs], I will make but one further observation, namely, that it would apply to cases of common law as well as statutable illegality; but I have spoken of it under the head of statutable illegality, because I do not remember any decided case arising upon a question as to illegality at common law which would aptly illustrate it. I can, however, put such a case without difficulty. Suppose, for instance, A. employs B., a builder, to repair the front of his house, and B., in so doing, erects an indictable nuisance in the public street, still, as the contract to repair the house is legal, and the erection of the nuisance in so doing was not contemplated by the agreement, B. might recover for the repairs which he had executed. But it would be otherwise if it had been made part of the agreement, that the repairs should be performed by means of the erection of the nuisance; for there the illegality would have entered into and formed part of the contract (b).¹

(a) *Pellecat v. Angell*, 2 Cr. M. & R. 311.

(b) As to contracts of which performance has become illegal after the making, see *Brown v. Mayor of London*, 30 L. J. (C. P.) 225; 31 L. J. (C. P.) 280, in Ex. Ch.

¹ The cases upon this subject seem to require a somewhat fuller notice. In *Rex v. Somerby*, cited by the lecturer, a pauper apprentice was moved, by reason of illness, from the parish of Melton Mowbray, to that of Somerby, where he resided forty days, during which time he was employed in selling lottery tickets, and it was held that he had gained a settlement in the latter parish, notwithstanding the unlawful act in which he had been engaged; though it was suggested that if the master and apprentice had conspired to-

Now, such being the effect of illegality created by statute, in avoiding an agreement tainted with it, and

gether, and moved thither for that purpose, the case might have been different: and this decision is perfectly reconcilable with principle and with all the authorities. But in *Pellecat v. Angell* it was held that a foreigner selling and delivering goods to a British subject could recover their price, although he knew at the time of the sale that the buyer intended to smuggle them into England, and the decision (which was in accordance with the previous case of *Hodgson v. Temple*, 5 Taunt. (1 E. C. L. R.) 181, except that the case went farther, both parties being English), to some extent, was rested on the distinction taken in *Biggs v. Lawrence*, 3 T. R. 454, between merely knowing of the illegal act, and being a party thereto. That case decided that where a smuggler bought brandy in Guernsey, and the vendor packed it in ankers in preparation for smuggling, he could not recover the price of it, because he was aiding in the breach of the revenue laws, while in *Holman v. Johnson*, Cowp. 342, where the vendor, a foreigner, knew of, but did not actively participate in the smuggling, he was held entitled to recover. Lord Abinger, however, in delivering the opinion in *Pellecat v. Angell*, did not rely wholly on this distinction between mere knowledge and participation, but to a great extent based his opinion upon the fact of the law which was infringed, being a foreign one to the plaintiff. "It is perfectly clear," said he, "that where parties enter into a contract to contravene the laws of their own country, such a contract is void; but it is equally clear, from a long series of cases, that the subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this, except indeed that when he comes within the act of breaking them himself, he cannot recover here the fruits of that illegal act. But there is nothing illegal in merely knowing that the goods he sells are to be disposed of in contravention of the fiscal laws of another country." Such a course of reasoning has been, however, seriously questioned by Mr. Justice Story in his treatise on the Conflict of Laws (§ 254, note), who asks, if a Frenchman could be allowed to recover, in England, the price of poison sold in France for the avowed purpose of poisoning the Queen. But it may be remarked of the English cases that for some time, and until a very recent period, contracts connected with a violation of the revenue laws, were rather less severely construed than those in violation of other statutory provisions (see some of the cases, *supra*, p. *19, note 2), and *Pellecat v. Angell*, which was decided in 1835, may, so far as concerns the above reasons, for the decision, be classed with these cases.

But upon the other ground, the line of distinction between knowledge and participation, or rather between what is and what is not participation, is at times a difficult one, and it is certain that the older cases have sanctioned recoveries in instances where they would now perhaps be denied. Thus, in *Falkney v. Reynous*, 4 Burr. 2069, the plaintiff and one Richardson were jointly concerned in transactions forbidden by the act "to prevent the infamous practice of stockjobbing" (7 Geo. 2, c. 8), and the plaintiff having paid the whole of the loss sustained by the failure of the operation, the Court

such being the distinction between illegality stipulated for—contemplated by the contract—and illegality oc-

(Lord Mansfield, C. J.) held that a suit could be maintained upon a bond given to the plaintiff by the defendants to secure the repayment of Richardson's proportion of the loss, as the illegality did not enter into this new transaction; and in the subsequent case of *Petrie v. Hannay*, 3 T. R. 418, the facts and the decision were the same way. So, it was formerly held that money lent to pay a gambling debt might be recovered, though the money lost could not: *Robinson v. Bland*, 2 Burr. 1077; *Barjeau v. Walmsley*, Str. 1249; *Alcinbrook v. Hall*, 2 Wils. 309; and these cases were approved in *Farmer v. Russell*, 1 B. & P. 299, though the decision in that case was on a different ground, viz., that one who had received money for the use of a party engaged in an illegal contract could not defend in an action for money had and received on the ground of illegality, he being considered in the light of a stakeholder (as to which see *infra*). But a class of cases soon followed, in which the authority of *Faikney v. Reynous*, and *Petrie v. Hannay*, was sometimes distinguished, but more frequently questioned: *Booth v. Hodgson*, 6 T. R. 405; *Lightfoot v. Tenant*, 1 B. & P. 551 (where Eyre, C. J., put the case of a druggist who should sell arsenic to one who he knew was going to poison his wife with it): *Aubert v. Maze*, 2 B. & P. 371, *Eldon, C. J.*; *Langton v. Hughes*, 1 M. & S. 593 (where it was held that one who sold drugs to a brewer, knowing that he would use them to adulterate ale with, contrary to a statute, could not recover, though it was not proved that they had been so used): *Webb v. Brooke*, 3 Taunt. 12; *Ex parte Mather*, 3 Ves. Jr. 373; *Ex parte Daniels*, 14 Ib. 192; *Gas Light Co. v. Turner*, 6 Bing. N. C. (37 E. C. L. R.) 324; and in *Cannan v. Bryce*, 3 B. & Ald. (5 E. C. L. R.) 179, two partners entered into an illegal stockjobbing transaction, by which a heavy loss was sustained, which was paid by a sum of money lent them by Bryce, the defendant, who, as the jury found, was not a partner in the stockjobbing transaction. In consideration of this loan, which had been only secured by a bond, one of the partners assigned to the defendant three cargoes of vessels and soon after, a commission of bankruptcy issued against both of them, and the assignees in bankruptcy were held entitled to recover the proceeds of these cargoes from the defendant. "If," said Abbott, C. J., who delivered the opinion of the Court, "the defendant acted unlawfully in lending his money to the bankrupts, he could not have sued them for the recovery of payment, because no suit can be maintained upon an unlawful act; and if recovery could not be enforced at law upon the contract of lending, neither could recovery be enforced upon a bond given for the performance of that contract;" nor, consequently, upon the assignments which were to secure the bond; and in *M'Kinnell v. Robinson*, 3 M. & W. 435, this case was approved, and it was held, in opposition to *Alcinbrook v. Hall*, that money lent to play hazard with could not be recovered back.

On this side of the Atlantic, the authority of the older and overruled English cases has, however, been in many instances recognized and affirmed: Thus, in *Carsan v. Rambert*, 2 Bay, 560, it was held (on the authority of *Robinson v. Bland*), that the value of a horse lent to stake at a gambling table

[*260] curing incidentally during the course *of its performance, I will proceed, as I did when

could be recovered by the lender, from the borrower. But the principal case is perhaps *Armstrong v. Toler*, 4 Wash. C. C. 297, and 11 Wheat. 258, where Armstrong and others contrived, during the war, a plan to smuggle into the country goods consigned to Toler, and on their seizure at the port of destination, Toler became security to the government to abide the event of the suit, and delivered to Armstrong his proportion of the goods on his promise of repayment, in case they should eventually be condemned. The goods were condemned, and Toler paid the amount of their appraised value, and in suit brought by him against Armstrong, it was objected that the contract was void, as founded on an illegal consideration; but the court below charged that the subsequent independent contract, founded on a new consideration (viz., that of the delivery of the goods to Armstrong), was not contaminated by the illegal importation, although it was known to Toler when the contract was made, *provided* the latter had no interest and participation in the importation, and this was left as a fact to the jury, who found that he had no such participation, and the judgment entered on the verdict was affirmed on error, upon the authority of *Faikney v. Reynous*, and *Petrie v. Hannay*; and to the same effect are *Smith v. Barstow*, 2 Dougl. 163; *Leavitt v. Blatchford*, 5 Barb. 9; *Hook v. Gray*, 6 Ib. 398; *Thomas v. Brady*, 10 Pa. St. 169; *Phalen v. Clark*, 19 Conn. 432 (some of which cases also recognized as authority those of *Faikney v. Reynous*, and *Petrie v. Hannay*); and in *Cheney v. Duke*, 10 Gill & J. 11, it was thought by the court to be abundantly settled that the knowledge of the vendor that the subject of the sale was to be illegally employed, could not defeat his recovery of the contract price; and in an action brought for the purchase-money of a slave, bought for the purpose of exportation contrary to a local statute, the plaintiff was, notwithstanding his knowledge of the unlawful exportation was proved, held entitled to recover, on the ground that nothing was done by him in furtherance of the illegal design.

In *M'Intyre v. Parks*, 3 Metc. 208, a mortgagee was, on the authority of *Holman v. Johnson*, *supra*, held entitled to recovery, though the consideration of the mortgage was lottery tickets, whose sale was prohibited in Massachusetts, on the ground that the contract was made in New York, where such sales were valid, and notwithstanding the mortgagee knew that they were intended to be sold in the former State, in violation of its laws; while in *Scott v. Duffy*, 14 Pa. St. 18, money lent in New Jersey to be bet upon the presidential election, was allowed to be recovered in Pennsylvania, on the ground that there was no evidence that such a bet was illegal in New Jersey. In *Steele v. Curle*, 4 Dana, 387, the following remarks were made upon this subject by Robertson, C. J., after referring to the different opinions which have been expressed:—

“We feel that it may be but proper to suggest, in passing, that we would be inclined neither to concur with, nor to dissent from, the doctrine of either party, *in extenso* and *altogether*, without limitations or qualification; but should rather incline to the conclusion that, although, as we are disposed to think, a

speaking of illegality at common law, to specify some of the instance of most ordinary practical occurrence,

simple knowledge, by a vendor, of the fact that a vendee buys an article for the purpose or with an intention of using it in violation of a public law, or a principle of moral rectitude, may, in strong and flagrant cases, such as that supposed by Chief Justice Eyre, be a sufficient reason for withholding, from either party, the aid of the law for enforcing the contract, yet there may be cases of a lighter shade or less degree of enormity, in which the same fact might not, alone, be entitled to the same effect: and in the latter class, we would be inclined to place the beer case decided by Lord Ellenborough. And the reason why we should be disposed to make any discrimination in consequence of the color or degree of the transgression contemplated by the buyer and merely understood by the seller, and why, also, we are inclined to agree with Chief Justice Eyre to some extent, is just because it does seem to us, that no one can sell a commodity, knowing that the buyer intends to use it for any purpose so flagitious as that of murder or treason, or other flagrant violation of the fundamental rights of man or of society, without betraying such a degree of turpitude and recklessness as to implicate him, as a voluntary and active participant in the unlawful design, and, as therefore, *quantum in illo*, willing and instigating a crime, which it is the civil duty of every citizen to oppose; and that the like knowledge alone, of the buyer's purpose of unlawful appropriation or use, would not necessarily lead to the like deduction, as to the motive or conduct of the seller, in every case of inferior degree,—as the beer case; the case of a purchase of an article with the intention of again making a fraudulent sale or use of it; the case of a loan of money to a person who borrows for the purpose of re-lending to a stranger at illegal interest; the case of a sale of merchandise by a wholesale merchant, in the regular course of his business, to one who, when he buys, intends to smuggle it into a foreign port, without paying the legal and accustomed duties; and many other cases of a similar kind, in which a citizen may be neutral without being guilty of incivism, or of any intentional participation in the unlawful design. In all such cases, it would seem to us, that in a commercial, busy, and enterprising age, the law should not attempt to establish a morality so pure, and exact, and vigilant, as that which would make it the legal duty of every seller of every vendible thing, to become a casuist or censor, so far as to make him responsible for the known motives of the buyer, and an active and guilty co-operator with him in his contemplated violation of law, of principle, or of justice."

The later English cases were, however, cited with approbation, and followed in *Perkins v. Savage*, 15 Wend. 418; *Branch Bank v. Crocheron*, 5 Ala. 256; *Wooten v. Miller*, 7 Sm. & M. 386, and *Duncan v. Cox*, 6 Blackf. 270.—R.

See also *Green v. Collins*, 3 Cliff. 494; *Brunswick v. Vallean*, 50 Iowa, 120; *Wilson v. Stratton*, 47 Me. 120; *Savage v. Mallory*, 4 Allen, 492; *Walan v. Kerby*, 99 Mass. 1; *Adams v. Couillard*, 102 Mass. 167; *Walker v. Jefferies*, 45 Miss. 160; *Rindskopf v. De Ruyter*, 39 Mich. 1; *Hill v. Spear*, 50 N. H.

in which the Legislature has, by express provision, rendered particular contracts illegal [or void].

The first (c) example to which I shall advert arises on contracts by way of gaming or wagering, and which now are void and not illegal (d). The Acts against Gaming were formerly exceedingly complex and troublesome; but the law has been much simplified by stat. 8 & 9 Vict. c. 109.

Before the passing of that statute the first Act to be noticed was that of 16 Car. II. c. 7, s. 3 of which enacted that if any one should play at any pastime or game, by gaming or betting upon those who game, and should lose more than the sum of £100 on credit, he should not be bound to pay, and any contract to do so should be void.

The 9th Anne, c. 14 (the principal enactment), provided in sect. 1, that all securities for money or any other valuable thing won by gaming or playing at cards, [*261] dice, tables, bowls, or other game *whatever, or by betting on those who game, or for money lent for such gaming or betting, or lent to gamblers at the place where they are playing, shall be void.

And the 2nd section exacted that any person who shall at a sitting lose the sum or value of £10 might recover back again within three months; and if he did

(c) In the earlier editions the first example was that of contracts void by usury, but the usury laws having been swept away (see *per* Kindersley, V. C., in *Bond v. Bell*, 27 L. J. (Ch.) 233, 235) by 17 & 18 Vict. c. 90, which came into force on the 10th Aug., 1854, it seems undesirable to mention them further here.

(d) *Beeston v. Beeston*, 1 Ex. D. 13; 45 L. J. (Q. B., etc.) 230; *Read v. Anderson*, 10 Q. B. D. 100; 52 L. J. (Q. B.) 214.

253; *Schermerhorn v. Talman*, 4 Kern. 93; *Powell v. Smith*, 66 N. C. 401; *Williams v. Carr*, 80 Ib. 294; *Wallace v. Lark*, 12 S. C. 576; *Henderson v. Waggoner*, 2 Lea, 133; *Kottwitz v. Alexander*, 34 Tex. 689; *Gaylord v. Soragen*, 32 Vt. 110.

not, any other person might, together with treble the value—half for himself, and half for the poor of the parish.

Now you will observe that under these two Acts securities for money lost at gaming, or by betting on the gamesters, or for money lent to them to game with, were illegal.

And you will further observe that, even if no security were given, but the loser paid in cash, still, if the sum lost amounted to £10, it might be recovered back again (e).

Now a *horse-race* is a *game* within the meaning of these Acts of Parliament, as you will find laid down in several cases (f); and therefore, if the law rested upon these statutes, all losses above £10 on any such race would be recoverable back by the loser, and would put the winner in danger of the penalties of the statute of Anne, and securities for *the payment of any [*262] such losses would be *void*. But it was thought that horse-racing, confined within due limits, had a tendency to improve the breed of horses, and thereby promote the interests of the country at large. Acts of Parliament were therefore passed, providing for this particular object, and excepting such races, to a certain extent, from the provisions of the Gaming Acts. This was first done by stat. 13 Geo. II., c. 19, which legalized matches run at Newmarket, or Black Hambleton, or for the sum of £50 and upwards. But this statute imposed certain restrictions as to the weights which the horses were to carry, which it seemed expedient to repeal; and for that purpose was passed 18 Geo. II., c.

(e) You may consult, on the construction of these Acts, *Sigel v. Jebb*, 3 Stark. (3 E. C. L. R.) 1; *Brogden v. Marriott*, 3 Bing. N. C. (32 E. C. L. R.) 88; and *M'Kinnell v. Robinson*, 3 M. & W. 434.

(f) *Goodburn v. Marley*, Str. 1159; *Blaxton v. Pye*, 2 Wils. 309; and *Brogden v. Marriott*, 3 Bing. N. C. (32 E. C. L. R.) 88.

34, s. 11, which, after reciting the restriction of the former statute as to weights, enacts that it shall be lawful for any person to run any match, or to start and run for any plate, prize, sum of money, or other thing of the value of fifty pounds or upwards, at any weights whatever, in the same manner as if the Act of the 13th of Geo. II. had never been made.

This Act, you will at once see, was made merely to take away the restrictions with regard to weight, which had been imposed by the 13th of Geo. II.; but though that was its object, by one of those strange accidents which are so common in the history of law, the legality of all horse-racing came to depend upon it.

[*263] *In the 1st section of the 13th of Geo. II. there was a very strange and unaccountable enactment. It enacted that no person should start more than one horse for the same plate; and that, if he did, all the horses entered by him, except the first, should be forfeited, and recovered by information or action at the suit of a common informer. The law regarding racing, mixed up as it was with the other Gaming Acts, being extremely complex, this portion of it was probably forgotten, and certainly was not universally acted upon, when suddenly, in the years 1839 and 1840, informations were filed for the purpose of recovering several valuable race-horses which had been entered by their owners, along with other horses their property, for the same stakes, in total ignorance of the prohibition of the Act of Parliament.

As soon as this was represented to the Legislature, it interfered for the protection of the defendants, and passed the 3 Vict. c. 5; but the Act, I presume, inadvertently, instead of repealing so much of the 13 Geo. II. as inflicted penalties, repealed that Act altogether *so far as it related to horse-races.*

Now it had always been supposed that the legality of horse-races depended on the 13 Geo. II., and that the Act of the 18th of the same reign was a subsidiary Act, and had merely the effect of taking off restrictions as to weight. And many persons therefore thought that the Act of 3 Vict. *c. 5, instead of effecting the object of the Legislature by protecting horse- [264] races, had repealed the only enactment by which they were supported, so that they had been thrown back into the class of games comprised within the statute of Anne, and would be illegal if for a larger stake than £10. At length the question arose, and was argued in a case of *Evans v. Pratt* (*g*) in which the Court of Common Pleas decided that the words of the 11th section of the 18 Geo. II., c. 34, were large enough to legalize all horse-races for stakes of £50 and upwards. Such races are therefore legal, and it is settled (*h*) that a race for £25 a side is a race for £50.

These statutes and cases were reviewed at great length in the case of *Applegarth v. Colley* (*i*), which decided that a horse-race for a sweepstakes for £2 each was not illegal, although the total amount subscribed and run for amounted to less than £50, inasmuch as neither the statute of Charles (it being a ready money payment) nor the statute of Anne applied to a "race for a sum of money not raised by the parties themselves (that being, in truth, a wager), but given by way of prize by a third person desirous of encouraging racing."

But though a race for £50 was thus legalised, a bet on such a race was not so, for it was *decided (*k*) that a person betting even on a legal horse-race [265]

(*g*) 11 L. J. (C. P.) 87; 3 M. & G. (42 E. C. L. R.) 759; and see *Bentinck v. Connop*, 5 Q. B. (48 E. C. L. R.) 693.

(*h*) *Bidmead v. Gale*, 4 Burr. 2432.

(*i*) 10 M. & W. 723.

(*k*) *Shillito v. Theed*, 7 Bing. (20 E. C. L. R.) 405.

is in the same situation as if he had betted upon any other game. •

Now there is one point not perhaps precisely forming part of, but strongly bearing on this subject, and of which I must here warn you. When I speak of the statutes of Charles and Anne as rendering bets of a greater amount than £10 recoverable back from the winner, and rendering all securities for bets void, you must understand me to speak of bets on persons gaming; for the words of the former statute are, by "playing at the games or betting on the players," and of the latter and more important one, "betting on the sides of such as game at any of the aforesaid games." All wagers, therefore, were not affected by these statutes, but only wagers upon *games*." Now a *foot-race* was held to be a *game* within these Acts (*l*), as also was a *dog-race* (*m*). So were *cards*, *dice*, *tennis*, *bowls*, for they are mentioned in the Acts; and so was *cricket*, though not specified (*n*); not that there was anything illegal in these amusements themselves, but that the law would not allow the winner of £10 or upwards to receive or retain his winnings, nor would it allow any security for any winnings at them to be enforced. But as *to wagers not made upon *games* [*266] within the meaning of these Acts of Parliament, if there was nothing illegal or opposed to public policy in the subject-matter of the wager, it was held that there was no statute which affected its validity. This was decided in the famous case of *Good v. Elliott* (*o*), in which the wager, whether a particular person had, before a particular day, bought a waggon,

(*l*) *Lynall v. Longbotham*, 2 Wils. 36.

(*m*) *Daintree v. Hutchinson*, 10 M. & W. 85.

(*n*) *Hodson v. Terrill*, 3 Tyr. 929; 1 C. & M. 797.

(*o*) 3 T. R. 693; and see *Hussey v. Crickitt*, 3 Camp. 168; *Jones v. Randall*, Cowp. 37; *Evans v. Jones*, 5 M. & W. 82.

was held legal, and the winner allowed to recover against the loser in an action, by three judges, contrary to the opinion of Mr. J. *Buller*, who advocated the view which probably would have been most consistent with sound policy—namely, that the Courts should refuse to occupy their own time and that of the public by trying such questions.

Such, then, being the state of the law as to gaming and wagering, in 1845 stat. 8 & 9 Vict., c. 109 was passed, of which s. 15 repeals 16 Car. II., c. 7, and so much of 9 Anne, c. 14, as was not altered by stat. 5 & 6 Will. IV., c. 41 (which Act will be referred to in the next lecture); and s. 18 of which enacts “that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be *null and void*; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable *thing alleged to be won upon any [*267] wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made; provided always that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.”

It is clear, that, at common law, contracts by way of gaming or wagering were not, as such, unlawful (*p*).¹

(*p*) *Thackoorseydass v. Dhondmull*, 6 Moo. (P. C.) 300; *Hampden v. Walsh*, 1 Q. B. D. 189; 45 L. J. (Q. B., etc.) 238.

¹ By the common law, wagers were valid: *Good v. Elliott*, 3 T. R. 693, and cases cited *supra*; *Campbell v. Richardson*, 10 Johns. 406; *Haskett v. Wootan*, 1 N. & McC. 180; *Clark v. Gibson*, 12 N. H. 386; *Ball v. Gilbert*, 12 Metc. 397; *Scott v. Duffy*, 14 Pa. St. 18; except so far as contrary, 1. To public policy, or 2. To private characters or feelings. The former ground renders invalid all

Their illegality depends upon statute law, and after numerous alterations, it does not seem, that, in the many

wagers on the result of an election: *Allen v. Hearn*, 1. T. R. 56; *Ball v. Gilbert*, *supra*; *Rust v. Gott*, 9 Cow. 169; *Wheeler v. Spencer*, 15 Conn. 28; *Lloyd v. Leisenring*, 7 Watts, 294; *Wagonseller v. Snyder*, *Ib.* 343; *Wroth v. Johnson*, 4 Harr. & M'Hen. 284; *Gardner v. Nolen*, 3 Harring. 420; *Laval v. Myers*, 1 Bai. 486; *Duncan v. Cox*, 6 Blackf. 270; on the acquittal or discharge of a prisoner: *Evans v. Jones*, 5 M. & W. 77; on the result of a prize fight: *Hunt v. Bell*, 1 Bing. (8 E. C. L. R.) 1; *McKeon v. Caherty*, 1 Hall, 300; in restraint of marriage: *Hartley v. Rice*, 10 East, 22, and the like. The second ground renders invalid, wagers as to whether an unmarried woman would have a child by a certain day: *Dichurn v. Goldsmith*, 4 Camp. 152; as to the sex of a third person: *Da Costa v. Jones*, Cowp. 729 (which was the well-known case as to the sex of the Chevalier D'Eon); as to the life of a human being: *Phillips v. Ives*, 1 Rawle, 37; and perhaps as to the solvency of a third person: *Thornton v. Thackray*, 2 Y. & Jerv. 156.

But as actions on wagers of any kind were never favoured by the courts, they have at times gone so far as to hold all wagers to be invalid: *Lewis v. Littlefield*, 15 Me. 233; *Collamer v. Day*, 2 Vt. 144; *Edgell v. M'Laughlin*, 6 Whart. 179; *Thomas v. Cronise*, 16 Ohio, 54; *Hoit v. Hodge*, 6 N. H. 104; *Rice v. Gist*, 1 Strob. 82; and in many of the States statutory provisions exist, forbidding wagering or gaming contracts, to a greater or less extent: *Wheeler v. Spencer*, 15 Conn. 28; *Fowler v. Van Surdam*, 1 Den. 557; *Faris v. Kirtley*, 5 Dana, 460.

Where a wager is invalid from any of the above causes, so long as the money remains in the hands of the stakeholder, it is considered as being still within the control of the parties, and the loser may maintain an action to recover his stake: *M'Allister v. Hoffman*, 16 S. & R. 148; *McAllister v. Gallaher*, 3 P. & W. 468; *Tarleton v. Baker*, 18 Vt. 9; although if the money have been actually and *bond fide* paid over by the stakeholder to the winner, no part of it can be recovered from the latter by the loser, for the case then comes within the maxim, *in pari delicto potior est conditio defendentis*: *McAllister v. Hoffman*, *supra*; *Speise v. M'Coy*, 6 W. & S. 485; *Danforth v. Evans*, 16 Vt. 538; *Machir v. Moore*, 2 Gratt. 257; *M'Hatton v. Bates*, 4 Blackf. 63; *Thomas v. Cronise*, 16 Ohio, 54; but if the stakeholder should pay over the money to the winner, after notice from the loser not to do so, he would pay at his own risk, and being in the position of a mere agent whose authority has been revoked, he would be liable to the loser for the amount of his stake: *Wheeler v. Spencer*, *supra*; *Ivey v. Phifer*, 11 Ala. 535; *Stacy v. Foss*, 19 Me. 335; *Perkins v. Hyde*, 6 Yerg. 288. The law was so held in New York in *Vischer v. Yates*, 11 Johns. 23; but that decision was overruled by *Yates v. Foot*, 12 *Ib.* 1; and although the Revised Statutes give a remedy against a stakeholder who pays over to the winner after notice from the loser, yet the courts apply the rule of *Yates v. Foot*, in cases not brought exactly within the statute as to form, time, etc.: *Brush v. Keeler*, 5 Wend. 250; *Fowler v. Van Surdam*, 1 Den. 557.

statutes on the subject of gaming, any enactment remains, except 6 Will. IV., c. 41, s. 1, hereafter mentioned, whereby they are rendered *illegal* (q).

For examples of contracts held void under 8 & 9 Vict., c. 109, s. 18, as being by way of gaming and wagering, you may refer to *Grizewood v. Blane* (r), *Rourke v. Short* (s), and *Hampden v. Walsh* (t).

*The first of these cases shows that a colour-able contract for the sale and purchase of rail- [*268] way shares where neither party intends to deliver or to accept the shares, but merely to pay "differences" according to the rise or fall of the market is *gaming* within the last-mentioned enactment (u). In *Rourke v. Short*,

(q) *Beeston v. Beeston*, 1 Ex. D. 13; 45 L. J. (Q. B., etc.) 230.

(r) 11 C. B. (73 E. C. L. R.) 538.

(s) 5 E. & B. (85 E. C. L. R.) 904; 25 L. J. (Q. B.) 196.

(t) 1 Q. B. D. 189; 45 L. J. (Q. B., etc.) 238. See also the recent cases of *Batson v. Newman*, 1 C. P. D. 573; *Higginson v. Simpson*, 2 C. P. D. 76, 46 L. J. (Q. B., etc.) 192, for other examples of contracts held void as being for gaming or wagering.

(u) But if a man employ a broker to speculate for him on the Stock Exchange, though it is not intended between the employer and the broker that the stock bought or sold should be accepted or delivered, but that the employer should only pay the differences, this is not void as a gaming transaction so as to preclude the broker from suing his employer for commission, or for an indemnity in respect of the contracts on which the broker has incurred a personal liability to third persons. *Thacker v. Hardy*, 4 Q. B. D. 685; 48 L. J. (Q. B., etc.) 289; *Ex parte Rogers*, *In re Rogers*, 15 Ch. Div. 207.

The student will find most of these, as well as many other authorities upon the subject of wagers and of wagering policies, in the note to *Godsall v. Boldero*, 2 Smith's L. C. 293.—R.

A bet on an election is void at common law: Like *v. Thompson*, 9 Barb. 315; See also *Bettis v. Reynolds*, 12 Ired. 344; *Terrall v. Adams*, 23 Miss. 570; *Bates v. Lancaster*, 10 Humph. 134; *Bevil v. Hix*, 12 B. Mon. 140. [*Lockhart v. Hullinger*, 2 Ill. App. 465.]

As to wagers generally, see *Smith v. Brown*, 3 Tex. 360; *Humphreys v. Magee*, 13 Mo. 435; *McElroy v. Carmichael*, 6 Tex. 454; *Parsons v. The State*, 2 Ind. 499. A contract to purchase shares of stock without the intention to deliver or receive them, is a gaming contract: *Brua's Appeal*, 55 Pa. St. 294; *Ex parte Young*, 6 Biss. 53. Contracts for the future sale and delivery of goods not in the possession of the vendor are not illegal: *Shipp v. Bowen*, 25 Ind. 44; *McIlvaine v. Egerton*, 2 Rob. 422.—S.

plaintiff and defendant, while conversing as to some rags which plaintiff proposed to sell and defendant to purchase, disputed as to the price of a former lot of rags, plaintiff asserting the price to have been lower than defendant asserted it to have been. They agreed that the question should be referred to M., a spirit merchant, and that whichever party was wrong should pay M. for a gallon of brandy, and that, if plaintiff was right, the price of the lot now on sale should be 6s. per cwt., but if the defendant was right 3s. M. decided that plaintiff was right. The latter sent the rags to defendant, but defendant refused to accept them at 6s., offering 5s. The Court held, that the contract was by way of wagering and could not be *upheld. In *Hampden v. Walsh*, the plaintiff, who disbelieved in the convexity of the earth, and a Mr. Wallace, deposited each £500 with defendant, on an agreement that if Wallace, on or before the 15th of March, 1870, proved the convexity or curvature to and fro of the surface of any canal, river, or lake, by actual measurement and demonstration, to the satisfaction of defendant, Wallace should receive the two sums deposited; but if Wallace failed in doing this, the two sums were to be paid to the plaintiff. The agreement was held to be a mere wager.

It is clear, under s. 18, that the lawfulness of any game at which any wager is made, does not make the wager lawful, in the sense of being recoverable in an action (*x*): but if a party loses a wager, and requests another to pay it for him, the loser is liable to the party so paying it for money paid at his request (*y*). And where the plaintiff had paid the defendant money on the terms that the defendant was to employ it in betting

(*x*) *Parsons v. Alexander*, 24 L. J. (Q. B.) 277; 5 E. & B. (85 E. C. L. R.) 263.

(*y*) *Rosewarne v. Billing*, 33 L. J. (C. P.) 55.

on certain horse-races, and to pay the plaintiff a certain proportion of the winnings, and the defendant did so bet and won, and gave a cheque to the plaintiff for his share of the winnings, it was held that the plaintiff could sue the defendant on the cheque, which was dishonoured, and on accounts stated *the defend- [*270] ant having received moneys for which he had agreed to account, and was therefore bound to do so (z). But it has been held also, that the amount of a bet lost at a horse-race, and paid by the loser into the hands of a third party, on the promise of the latter to pay it to the winner, cannot be recovered by the winner out of the assets of such third person, if deceased (a).

Where money is deposited with a stakeholder to abide the event of any wager, there is nothing, in the section under consideration, to prevent such a depositor, who repents of his venture and repudiates the wager, from revoking the authority given by him to the stakeholder to pay the money to the winner, at any time before the stakeholder has paid over the money, and suing the latter for his deposit, and recovering it from him (b). But the winner, after the happening of the event on which the wager depended, cannot recover his winnings unless the transaction comes within the protection of the proviso with which section 18 *con- [*271] cludes (c). Where the deposit comes within s. 5 of 16 & 17 Vict. c. 119 (for the suppression of Betting-houses), it may under that section be recovered

(z) *Beeston v. Beeston*, 1 Ex. D. 13, 45 L. J. (Q. B., etc.) 230. See also *Ex parte Pyke, In re Lister*, 8 Ch. Div. 754.

(a) *Beyer v. Adams*, 26 L. J. (Ch.) 841.

(b) *Diggle v. Higgs*, 2 Ex. D. (C. A.) 422, 46 L. J. (Q. B., etc.) 721; *Hampden v. Walsh*, 1 Q. B. D. 189; 45 L. J. (Q. B., etc.) 238; *Varney v. Hickman*, 5 C. B. (57 E. C. L. R.) 271; *Martin v. Hewson*, 24 L. J. (Ex.) 174; 10 Ex. 737; *Trimble v. Hill*, 5 App. Cas. 342; 49 L. J. (P. C.) 49.

(c) *Varney v. Hickman*, *Parsons v. Alexander*, *supra*, *Savage v. Madder*, 36 L. J. (Ex.) 178.

from the receiver as money received for the use of the depositor (*d*).

Where, however, a person employed a turf commission agent to bet for him in the agent's own name, and the agent made the bet accordingly and became himself personally liable for payment in the event of loss, incurring serious disabilities if a defaulter, it was held that the principal after the bet was made could not, where the bet was lost but before the money was paid over, repudiate the authority and subsequently refuse to repay the agent the money he had paid in pursuance of the lost bet. The authority was held irrevocable, both on the ground that an authority coupled with an interest in the donee of the authority is irrevocable, and also on the ground that if one man employs another to do a legal act (*e*), which in the ordinary course of things will involve the agent in pecuniary obligations or otherwise, a contract on the part of the employer to indemnify his agent is implied by law (*f*).

[*272] *Although a foot-race comes within the proviso in s. 18 as being a "lawful game, sport, or pastime" (*g*), yet an agreement to walk a match for £200 a-side, the money being deposited with a stakeholder, is a wager, and null and void under that section; and the deposit of the money is not a subscription or contribution for a sum of money to be awarded to the winner of a lawful game, within the meaning of the proviso (*h*). And the proviso does not extend to

(*d*) See as to that section, *Doggett v. Cattermoss*, 34 L. J. (C. P.) 46.

(*e*) That making a bet is not an illegal act, see *ante*, p. *260.

(*f*) *Read v. Anderson*, 10 Q. B. D. 100; 52 L. J. (Q. B.) 214, affirmed by a majority of the C. A., *diss. Brett*, M. R., 51 L. T. Rep. N. S. 55. See also *Thacker v. Hardy*, 4 Q. B. D. 685; 48 L. J. (Q. B., etc.) 289, *ante*, p. *268.

(*g*) *Batty v. Marriott*, 5 C. B. (57 E. C. L. R.) 818.

(*h*) *Diggle v. Higgs*, 2 Ex. D. (C. A.) 422; 46 L. J. (Q. B., etc.) 721; overruling *Batty v. Marriott*, 5 C. B. (57 E. C. L. R.) 818, where it was held that

a case where two persons ran their horses against each other, the winner to have both horses, there being no subscription or contribution towards any plate, prize, or sum of money to be awarded to the winner(*i*).

There is, however, one class of *wagers* which requires some attention. I allude to wagers in the shape of policies of insurance. An insurance, as you doubtless are aware, is a contract by which, in consideration of a premium, one or more person or persons assure another person or persons in a certain amount against the happening of a particular event; for instance, the death of an individual, the loss of *a ship, or [*273] the destruction of property by fire. These three classes of policies, upon *ships*, *lives*, and *fire*, are of the most common occurrence; but there is nothing to prevent insurance against other events; for instance in *Carter v. Boehm* (*k*), one of the most celebrated cases in the Reports, Lord *Mansfield*, and the rest of the then Court of King's Bench, supported a policy of insurance against foreign capture effected in a fortress. Now, this contract of insurance, though one of the most beneficial known to the law, since it enables parties to provide against events which no human skill can control, to provide, for instance, against the ruin of a family by the sudden death of a parent, the ruin of a merchant by the loss of his venture at sea, or of a manufacturer by the outbreak of a fire on his premises, though productive, therefore, of most beneficial consequences to society, yet is very liable to be abused, and made an engine of mere gambling; for instance, A. insures B.'s life, *i. e.*, he pays so much a year, or so much in the lump, to some one who is to pay him so such a deposit was within the protection of the proviso: *Trimble v. Hill*, 5 App. Cas. 342; 49 L. J. (P. C.) 49.

(*i*) *Coombes v. Dibble*, L. R. 1 Ex. 248; 35 L. J. (Ex.) 167.

(*k*) 3 Burr. 1905; 1 Smith, L. C. 550, 8th ed.

much upon B.'s death. If B. owes him money, and his object is to secure himself, it is a *bonâ fide* insurance; but if B. is a mere stranger, in whose life he has no interest, it is a mere wager. In order to prevent the contract of insurance from being thus abused, the statute 14 Geo. III., c. 48, prohibiting wager policies, as [*274] they are called, *altogether, prevents a man from insuring an event in which he has no interest, and where he has an interest, but not to the extent insured, prohibits him from recovering more than the amount of his interest. The effect of this Act, in a word, is to invalidate wagers framed in the shape of policies of insurance—thus, a wager on the price of Brazilian shares framed like a policy was held invalid (*l*). But where the transaction would not be commonly understood to be a policy of insurance, and therefore would not fall within the words of the stat. 14 Geo. III., c. 48, taken in their ordinary acceptance, the Courts would probably not consider it as within this Act (*m*).

This Act applies to all subjects of insurance except marine risk, and these are provided for by the insertion of a similar prohibition contained in 19 Geo. II., c. 37, s. 1, enacting, that no insurance shall be made on any ship belonging to his Majesty or any of his subjects, or on any goods, merchandise, or effects, laden or to be laden on board thereof, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurers. And it is decided that one who has any interest may be insured to the extent of it, and any one may be considered to have an interest, who may be injured by the risks to which the subject-

(*l*) *Paterson v. Powell*, 9 Bing. (23 E. C. L. R.) 320.

(*m*) *Cook v. Field*, 15 Q. B. (69 E. C. L. R.) 475.

matter *is exposed, or who but for such risks [*275] would have an advantage in the ordinary and probable course of things (*n*).

It having been enacted by the statute 14 Geo. III., c. 48, that no insurance shall be made by any person on the life of any person, or on any other event whatsoever, wherein the person for whose use, benefit, or on whose account such policy shall be made, shall have no interest, and that every assurance made contrary to the intent thereof shall be null and void, it is important to ascertain what is to be considered as an interest in the event within the meaning of this statute. It is clear that a creditor has an interest in the life of his debtor (*o*), that a trustee may insure for the benefit of his *cestui que trust* (*p*), that a wife has an interest in her husband's life (*q*), and that a man may assure his own life, which is the common case of every day's experience; but he cannot evade the statute by doing so with the money of another, which other is to derive the benefit of the assurance, and has no interest in his life, since so to do would be virtually *enabling a person to effect an assurance on an event wherein he has [*276] no interest (*r*). It is also required that in every policy on the life of another the name of the person really interested when the policy is effected, or for whose benefit it is effected, must be inserted as the person interested, and the omission or erroneous statement of the person

(*n*) *Lucena v. Craufurd*, 2 B. & P. N. R. 300; *Briggs v. Merchant Traders' Shipping Assurance Association*, 13 Q. B. (66 E. C. L. R.) 167; see *Dalby v. India London Life Ass. Co.*, 24 L. J. (C. P.) 2; 15 C. B. (80 E. C. L. R.) 365, in Ex. Ch.; and the note to *Godsall v. Boldero*, 2 Smith, L. C., 291, 8th ed.

(*o*) *Von Lindenau v. Desborough*, 3 Car. & P. (14 E. C. L. R.) 353; *Cooke v. Field*, 15 Q. B. (69 E. C. L. R.) 460.

(*p*) *Tidswell v. Ankerstein, Peake*, 151; *Craufurd v. Hunter*, 8 T. R. 13.

(*q*) *Read v. Royal Exchange Assurance Company, Peake, Ad. C.* 70.

(*r*) *Wainwright v. Bland*, 1 M. & W. 32; *Shilling v. Accidental Death Ass. Co.*, 26 L. J. (Ex.) 266; 2 H. & N. 42; 27 L. J. (Ex.) 17.

interested, avoids the policy, whether a wagering policy or not (s).

(s) 14 Geo. 3, c. 48, s. 2; *Hodson v. Observer Life Ass. Society*, 26 L. J. (Q. B.) 303; 8 E. & B. (92 E. C. L. R.) 240. See 38 & 39 Vict. c. 60 (The Friendly Societies Act, 1875), s. 25, as to insurances on the lives of children under 10, made with Friendly Societies. Sub-s. (8) of this section preserves such insurances from being invalidated by 14 Geo. 3, c. 48.

THE LORD'S-DAY ACT.—SIMONY.—ILLEGAL WEIGHTS AND MEASURES.—CONTRACTS BY ILLEGAL COMPANIES.—ASSIGNMENT OF CONTRACTS.—BILLS OF EXCHANGE FOR ILLEGAL CONSIDERATION.—RECOVERY OF MONEY PAID ON ILLEGAL CONTRACTS.

THERE are some other heads of statutable illegality which are frequently set up as affording an answer to any attempt to enforce contracts vitiated by them. I directed your attention on the last occasion, to the defences which arise under the laws enacted for prevention of gambling; noticing the invalidity of certain wagers not falling within the statutes against gaming, by reason of the Acts of Parliament which prohibit wagering insurances.

The first (a) class of cases to which I will now advert, consists of those contracts falling within the operation of the statute commonly known by the name of the Lord's Day Act. It is 29 Car. II., *c. 7, and it enacts [*278] that no tradesman, artificer, workman, labourer, or other person whatever shall do or exercise any worldly labour, or business or work of their ordinary callings, upon the Lord's day (works of necessity or charity only excepted), and that every person of the age of fourteen years offending in the premises, shall forfeit five shillings.¹ The contracts prohibited by this

(a) The first class of contracts treated of in this lecture in the earlier editions were those falling within the prohibition of the Stockjobbing Acts: but the latter having been repealed by 23 Vict. c. 28, it seemed better to omit all mention of such contracts from the text, as being no longer amongst "the instances of most ordinary practical occurrence." See *ante*, p. *260.

¹ At common law, judicial proceedings alone seem to have been forbidden

statute are, you will observe, not every contract made on Sunday, but contracts made in the exercise of a

on Sunday: *Mackalley's Case*, 9 Co. 66 b; *Comyns v. Boyer*, Cro. Eliz. 485; *Story v. Elliot*, 8 Cow. 28; *Sayles v. Smith*, 12 Wend. 59; *Boynnton v. Page*, 13 Ib. 429; *Kepner v. Keefer*, 6 Watts, 233; all other transactions, therefore, done on that day depend as to their illegality upon statutory prohibition. The history of the regulations gradually adopted on this subject was thus sketched by Gilchrist, J., in the recent case of *Allen v. Deming*, 14 N. H. 136. "It appears," said he, "that the ancient Christians used all days alike for the hearing of causes, not sparing (as it seemeth, the Sunday itself. One reason for this was, that they might not imitate the heathens, who were superstitious about the observance of days; and also, that by keeping their own courts always open, they might prevent Christian suitors from resorting to heathen courts: *Spelman's Original of the Terms*, c. 17; *Swan v. Broome*, 3 Burr. 1598. But the practice ceased with the reason for it, and in the year 510, a canon was made, '*Quod nullus episcopus vel infra positus die dominico causas judicare præsumat.*' This canon, with others of a similar character, was confirmed by William the Conqueror and Henry the Second, and so became part of the common law of England. But the canons extended no farther than to prohibit judicial business on Sundays; for fairs, markets, sports, and pastimes might still take place on the Sabbath: *Comyns v. Boyer*, Cro. Eliz. 485, decides that a fair held on Sunday is well enough, although by the 27 Hen. 6, ch. 5, a penalty was inflicted on him who sold on that day. The toleration of amusements, and the existence of fairs in England to a greater or less degree upon the Sabbath, are readily accounted for by their own accordance with the practice of Roman Catholic countries, among which was England until the Reformation in the reign of Henry the Eighth. With the spread of the reformed religion, and the consequent improvement in civilization, the views and manners of the people changed on the subject of the rational observance of the Sabbath, and in all Protestant communities laws were enacted to secure it, varying in their provisions with the peculiarities of the people. Pastimes of various kinds were prohibited by the 1 Car. 1, c. 1, and by the 29 Car. 2, ch. 7. All persons were prohibited from 'doing or exercising any worldly labour, business, or work of their ordinary calling upon the Lord's day.'" In the opinion of Lord Mansfield in *Swan v. Broome*, 3 Burr. 1598, referred to in the above extract, the student will find much of the old learning on this subject.

It is believed that provisions, more or less similar to those of the statute of Charles, exist in all the United States. In New York, the statute refers only to "servile labour," and "exposing goods for sale." In South Carolina, New Hampshire, and Rhode Island, it has been nearly exactly copied. In many of the other States, such as Pennsylvania, Massachusetts, Maine, Vermont, and Connecticut, the provisions are more strict, interdicting all secular labour, whether in one's ordinary calling or not. Thus, no action can be maintained for a deceit in the exchange of horses on Sunday: *Robeson v. French*, 12 Metc. 24; or a breach of warranty: *Lyon v. Strong*, 6 Vt. 219; *Adams v. Hamell*, 2 Doug. 73; nor for any injury received while travelling on that day, by reason

man's *trade or ordinary calling*; thus it has been decided in *R. v. Whitnash* (b), that a contract made on

(b) 7 B. & C. (14 E. C. L. R.) 596; *R. v. Silvester*, 33 L. J. (M. C.) 79.

of a defective highway (the journey not being one of necessity or mercy): *Bosworth v. Swansey*, 10 Metc. 365 (though it would be a work of necessity to repair the road on Sunday: *Flagg v. Millbury*, 4 Cush. 244); or on a note given on that day: *Kepner v. Keefer*, 6 Watts, 232; and the like. There was a rather early decision in Massachusetts (*Geer v. Putnam*, 10 Mass. 312), to the effect that a plea that a note was void because executed on Sunday, was bad on demurrer, but the case proceeded on the ground that the plea did not state on what part of Sunday the note was made, the act only extending between midnight on Saturday and the sunset of the next day; and though the authority of the case was more broadly applied in *Clap v. Smith*, 16 Pick. 247, yet the recent cases have explained the decision on the ground just stated: *Bosworth v. Swansey*, 10 Metc. 364, arg.; *Robeson v. French*, 12 Ib. 24.

In *Specht v. The Commonwealth*, 8 Pa. St. 313, it was held, affirming the previous decision of *Commonwealth v. Wolf*, 3 S. & R. 47, that the Pennsylvania Lord's Day Act was not at variance with the provision in the State constitution, declaring the right of freedom of conscience in religious matters, and a conviction, under the act, of one of the sect called the Seventh Day Baptists was therefore sustained, the decision being based upon the ground of a day of rest being necessary to the welfare of society, and that the mere prohibition of secular occupation did not interfere with the right of conscience. The case of *Cincinnati v. Rice*, 15 Ohio, 225, was decided upon a clause in the local statute, exempting persons who conscientiously kept holy the seventh day, and a somewhat similar provision is found in the Massachusetts statute.

But although a bond may be void because executed on Sunday, so that, as a bond or contract, no suit can be maintained upon it, yet in a suit founded on the previous liability of the defendant, the bond may be regarded as an acknowledgment of that liability, as there is nothing to prevent a man from acknowledging the truth on Sunday, and consequently nothing to prevent its being given in evidence against him: *Lea v. Hopkins*, 7 Pa. St. 492; and in any case in which such a defence is set up, it is necessary that the statute be specially pleaded: *Fox v. Mensch*, 3 W. & S. 444; unless of course where local statutory or other rules of pleading have varied this general principle.—R.

See *Smith v. Bean*, 15 N. H. 577; *Flagg v. Millbury*, 4 Cush. 243; *Nason v. Dinsmore*, 34 Me. 391; *Goss v. Whitney*, 24 Vt. 187; *Sumner v. Jones*, Ib. 317; *Hooper v. Edwards*, 18 Ala. 280; *Hilton v. Houghton*, 35 Me. 143; *Stackpole v. Symonds*, 23 N. H. 229; *Rainey v. Capps*, 22 Ala. 288; *Slade v. Arnold*, 14 B. Mon. 287; *Murphy v. Simpson*, Ib. 419; *Hill v. Sherwood*, 3 Wis. 343; *Hussey v. Roquemore*, 27 Ala. 286; *Goss v. Whitney*, 27 Vt. 272. An agreement to publish an advertisement in a newspaper issued on Sunday is void: *Smith v. Wilcox*, 25 Barb. 341, 24 N. Y. 353. A promise to pay a debt on Sunday will not take the case out of the Statute of Limitations: *Bumgardner v. Taylor*, 28 Ala. 687. The Court will leave parties who swapped horses on

Sunday by a farmer for the hire of a labourer, is valid. The Court decided, in the first place, that a farmer was not a person within the meaning of the statute at all, for that the meaning of the words "tradesman, artificer, workman, labourer, *or other person whatsoever*," was to prohibit the classes of persons named and other persons *ejusdem generis*, of a like denomination; and they did not consider a farmer to be so (c). . And, secondly, they held that even if the farmer were comprehended within the class of persons prohibited, the hiring of the servant could not be considered as *work done* in his *ordinary calling*, for, said Mr. J. Bayley, "those things which are repeated *daily* or *weekly* in the course of trade or business are parts of the *ordinary calling* of a man exercising such trade or *business; but [*279] the hiring of a servant for a year does not come within the meaning of those words."

(c) *R. v. Silvester*, 33 L. J. (M. C.) 79.

Sunday without remedy: *Jordan v. Moore*, 10 Ind. 386. When both parties to a contract violate the law in making it, the law will not aid either to set it aside: *Greene v. Godfrey*, 44 Me. 25. The fact that a contract is signed on Sunday does not avoid it, unless it be delivered on Sunday: *Sherman v. Roberts*, 1 Grant, 261; *Merrill v. Downs*, 41 N. H. 72; *Smith v. Foster*, Ib. 215; *Tucker v. Mowrey*, 12 Mich. 378. A contract not void at common law nor expressly avoided by any statute, and which has been fully executed by the parties binds them although made on a Sunday. The delivery of a deed on Sunday is sufficient to pass the title: *Shuman v. Shuman*, 27 Pa. St. 90.—s.

In *Dale v. Knepp*, 98 Pa. St. 389, it was held (following *Allen v. Duffy*, 43 Mich. 1, and disapproving *Catlett v. Trustees*, 62 Ind. 365), that an agreement to subscribe for the erection of a church edifice is a work of charity, and may therefore be enforced, though made on Sunday. In *Rogers v. W. U. Tel. Co.*, 78 Ind. 169, Elliott, C. J., said, "Courts can not declare, as matter of law, that the business of telegraphy is a work of necessity. There are, doubtless, many cases in which the sending and delivery of a message would be a work of necessity within the meaning of our statute. But we cannot judicially declare that all contracts for the transmission of telegraphic messages are to be deemed within the statutory exception. Whether the contract is within the exception must be determined, as a question of fact, from the evidence in each particular case."

The former of the two points decided in this case furnishes a very good exemplification of the celebrated rule of construction as applied to statutes, namely, that where an Act mentions particular classes of persons, and then uses *general* words, such as "*all others*," the general words are restrained to persons of the like description with those specified (*d*). And, therefore, where a statute (*e*) recites that the Lord's day is much broken and profaned by carriers, waggoners, carters, wainmen, butchers, and drovers of cattle, and then enacts that those persons (naming them) shall not, by themselves, or any other, travel upon the Lord's day, and the Lord's Day Act contains the words previously recited, it has been determined that the owner or driver of a stage coach is not included within the words "other persons whatsoever," forbidden to exercise his calling on the Lord's day. The same construction was put upon the Lord's Day Act in a subsequent case, that of *Peate v. Dicken* (*f*), where it was decided, first, that an attorney was not within the description of persons intended by the statute; and secondly, that if he were, an agreement made on Sunday to become personally *responsible for the debt of a client, could not be said [*280] to fall within his *ordinary calling*.

But perhaps the second point illustrated by these cases is put in the clearest light by those of *Drury v. De Fontaine* (*g*) and *Fennell v. Ridler* (*h*), in the former of which cases it was considered that the sale of a horse on a Sunday by a person not being a horse-dealer,

(*d*) See *Sandiman v. Breach*, 7 B. & C. (14 E. C. L. R.) 96; *Queen v. Nevill*, 8 Q. B. (55 E. C. L. R.) 452. See *Bishop v. Elliott*, 24 L. J. (Ex.) 229; 11 Ex. 113.

(*e*) Stat. 3 Car. 1, c. 1.

(*f*) 1 Cr. M. & R. 422.

(*g*) 1 Taunt. 131.

(*h*) 5 B. & C. (11 E. C. L. R.) 406.

was not void, such sale not being within the ordinary calling of the plaintiff; and in the second, that a horse-dealer could not maintain an action upon a contract for the sale and warranty of a horse bought by him on a Sunday, it being obvious that, in doing so, he was exercising the business of his ordinary calling. In accordance with these cases, it has been decided that one tradesman giving another, on the Lord's day, a guaranty for the faithful services of a traveller is not, in doing so, exercising his ordinary calling (*i*): and the same conclusion was come to in a still more recent case upon this subject, where it was decided that a recruiting officer enlisting a soldier on a Sunday is not executing his ordinary calling on the Lord's day (*k*).

The cases in which the Act is most frequently sought to be applied are those of sales, of which you may see a remarkable instance in *Simpson v. *Nichols* (*l*). [*281] This was an action for goods sold and delivered. The defendant pleaded that they were sold and delivered by him to the plaintiff in the way of his trade on a Sunday, contrary to the statute; the plaintiff replied, that, after the sale and delivery of the goods, the defendant kept them for his own use, without returning or offering to return them, and had thereby become liable to pay as much as they were worth. This replication was considered to be no answer at all to the plea. A case had been cited in the argument (*m*), where the defendant, having purchased a heifer of a drover on a Sunday, and having afterwards kept it and expressly promised to pay for it, was held liable by virtue of that

(*i*) *Norton v. Powell*, 4 M. & Gr. (43 E. C. L. R.) 42. See *Scarfe v. Morgan*, 4 M. & W. 270.

(*k*) *Wolton v. Gavin*, 16 Q. B. (71 E. C. L. R.) 48.

(*l*) 3 M. & W. 240.

(*m*) *Williams v. Paul*, 6 Bing. (19 E. C. L. R.) 653.

promise. But Mr. Baron *Parke* observed (*n*) that, as the property in the goods passed by delivery, the promise made on the following day to pay for them could not constitute any new consideration, and therefore he doubted whether that case could be supported in law. Perhaps, however, the Court considered that case as within the rule mentioned, *ante*, page *203, and that the express promise there mentioned might revive the precedent consideration, which might have been enforced at law through the medium of an implied promise, had not the party been *exempted by the positive rule of law forbidding such a contract on the [*282] Lord's day (*o*).

Yet, from the application of the Act to these cases even there are some exceptions; some created by the Act itself, which permits food to be sold in inns and cookshops to persons who cannot be otherwise provided, and for the sale of milk at certain hours; others by 10 & 11 Will. III., c. 24, s. 14, which legalises the sale of mackerel before and after divine service; others by 10 & 7 Will. IV., c. 37, which allows *bakers* to carry on their business to a certain extent and under certain restrictions, see s. 14; and, indeed, even before the passing of that Act or of the 34 Geo. III., c. 61, on the same subject, it had been decided that a baker baking provisions for his customers was out of the purview of the Act altogether, that being a work of necessity (*p*); and there are other exceptions created by other particular enactments—as, for instance, in the case of hackney carriages.¹

(*n*) *Simpson v. Nichols*, 5 M. & W. 702, note.

(*o*) See *Scarfe v. Morgan*, 4 M. & W. 270. See per *Bosanquet, J.*, 6 Bing. (19 E. C. L. R.) 655.

(*p*) See *R. v. Cox*, 2 Burr. 785; *R. v. Younger*, 5 T. R. 449.

¹ A contract, however, for the sale of goods made on Sunday, is not affected

Another class of contracts falls within the prohibition of the Acts aimed against *simony*. There are two statutes on this subject: the 31 Eliz., c. 6, and 12 Anne, st. 2, c. 12; the former of which enacts that if any *patron*, for any corrupt consideration, by gift or promise, directly or indirectly, shall present or collate any person to any ecclesiastical *benefice or dignity,—
 [*283] such presentation shall be void, the presentee shall be incapable of enjoying the benefice, and the Crown shall present to it (*q*).

(*q*) *Goldham v. Edwards*, 24 L. J. (C. P.) 189; 18 C. B. (86 E. C. L. R.) 389.

by the statute, unless it is a complete contract on that day: *Butler v. Lee*, 11 Ala. 885; *Adams v. Gay*, 19 Vt. 358, where the subject is elaborately examined. Thus, if the article was not to be delivered, or the price paid till another day, the contract would not be, under the Statute of Frauds, binding till that was done: *Bloxsome v. Williams*, 3 B. & C. (10 E. C. L. R.) 232; *Beaumont v. Brengeri*, 5 C. B. (57 E. C. L. R.) 301. So of a promissory note written on that day, but not delivered till another: *Lovejoy v. Whipple*, 18 Vt. 379; *Clough v. Davis*, 9 N. H. 500. And although the consummation of the transaction may occur on Sunday, yet if the party seeking to enforce the rights growing therefrom, had ceased all *his* agency in the matter before that day, there will be no invalidation as to him; as where a case was submitted to arbitrators late on Saturday night, who made up their award early on Sunday morning, it was held that assumpsit might be maintained on the award, for the plaintiff had no voluntary agency in consummating the transaction on that day: *Sargeant v. Butts*, 21 Vt. 101; *Richardson v. Kimball*, 28 Me. 475.—R.

When a contract for labour is entered into on Sunday, and the contract is afterwards performed by the labourer, the promisor cannot set up the illegality of the contract: *Meriwether v. Smith*, 44 Ga. 541. The vendor of property sold and delivered on Sunday may reclaim such property upon tendering to the vendee the price received: *Tuckey v. Mowrey*, 12 Mich. 378. A note dated and to take effect on Sunday, but made and given on a previous day is valid: *Stacy v. Kemp*, 97 Mass. 166. A contract not otherwise invalid, but void only because made on Sunday, is susceptible of ratification: *Tucker v. West*, 29 Ark. 386; *Love v. Wells*, 25 Ind. 503; *Smith v. Case*, 2 Or. 190, *Contra*, *Day v. McAllister*, 15 Gray, 433; *Ryno v. Darby*, 20 N. J. Eq. 231; *Finn v. Donahue*, 35 Conn. 216; *Pate v. Wright*, 30 Ind. 476; *Bradley v. Rea*, 103 Mass. 188; *Harrison v. Colton*, 31 Iowa, 16. See *Pope v. Lynn*, 50 Me. 83; *Miller v. Lynch*, 38 Miss. 344; *Pike v. King*, 16 Iowa, 49; *Finlay v. Quirk*, 9 Minn. 194; *Foreman v. Ahl*, 55 Pa. St. 325; *Myers v. Meinrath*, 101 Mass. 366; *Whelden v. Chappel*, 8 R. I. 230.—s.

The other statute is that of 12 Anne, stat. 2, c. 12, sect. 2 of which enacts in effect that if any person, for money or profit, shall procure in his own name, or in the name of any other, the next presentation (*r*) to any living ecclesiastical, and shall be presented thereupon, the contract shall be deemed to be simonaical, and the presentation is to devolve upon the Crown.

It was decided on the construction of the former Act, that of Elizabeth, very soon after it passed—that a contract to purchase a living actually vacant at the time of the purchase was a simonaical contract, and avoided by the operation of the statute. That was taken for granted in *Baker v. Rogers* (*s*), which was decided but a very short time after the passing of the Act; but still, although, after the statute of Elizabeth, it was admitted, that to contract for the right to present to a church *actually* *void, was simony, yet it was also held, [*284] that it was not simony to purchase the next presentation at a time when the church was full, and it was therefore uncertain when that presentation would accrue (*t*). And so the law continues to be to this day, with a qualification introduced by the statute of Anne, the nature of which I am about to explain to you.

The statute of Elizabeth, and the decisions upon it, had, as I have just said, established two points; first, that the right to present to an actually void benefice could not be purchased; secondly, that the right of next presentation might be so, provided that the living was

(*r*) The purchase of an estate for life in an advowson is not the purchase of a "next presentation" or "next avoidance" within the meaning of this enactment, though there be only one avoidance or vacancy of the living during the lifetime of the *cestui que vie*, and the purchaser in point of fact gets the next presentation and presents himself. What he purchases is a freehold interest in the advowson to which the statute of Anne does not apply. *Walsh v. Bishop of Lincoln*, L. R. 10 C. P. 518, 44 L. J. (C. P.) 244.

(*s*) Cro. Eliz. 788.

(*t*) See Cro. Eliz. 685, *Smith v. Shelborne*.

full at the time of the contract. Certain clergymen took advantage of this state of the law to purchase next presentations, with the intention of presenting themselves upon the occurrence of a vacancy. This practice being considered highly indecorous, the statute of the 12th of Anne was passed to put a stop to it, and that Act renders it illegal and simonaical on the part of a *clergyman* to purchase the next presentation to a living actually full, and to present himself, leaving the right of a layman to do so just as it stood before under the Act of Elizabeth.

The operation of these two statutes was elaborately discussed—first in the King's Bench and subsequently [*285] in the House of Lords—in the great *case of *Fox v. Bishop of Chester* (*u*). In that case the incumbent of a living was exceedingly ill, and upon his death bed. The proprietor of the advowson and another person being aware of this, and believing that his death was near at hand, agreed for the sale of the next presentation, and in order to carry the agreement into effect, executed a deed a few hours only before his death, which purported to convey the advowson to the vendee for ninety-nine years, but contained a proviso for reconveyance as soon as one presentation should have been made. After the death of the incumbent, the vendee under this deed presented a clergyman who was in no way privy to the bargain; and, consequently, the only question was as to the legality of the bargain itself, and it was strongly urged that it was void; for, it was contended, that the transaction was a fraud upon the statute of Elizabeth, since, under the circumstances, the living was for every *practical* purpose vacant at the time of the contract, although it was possible that the in-

(*u*) 2 B. & C. (9 E. C. L. R.) 635; and 6 Bing. (19 E. C. L. R.) 1.

cumbent might linger on for a few hours after the delivery of the deed. And such was the opinion of the Court of King's Bench, who delivered their judgment accordingly. But it was carried to the House of Lords, and there reversed according to the unanimous opinion of the other judges, and of Lord *Eldon*, who was at that time Chancellor.

Connected with, and indeed, forming a part of *this branch of the subject, are the decisions with regard to *resignation bonds*, the history of [*286] which is extremely curious.

It had become a very common practice when the patron of a living had a son intended for the church, and the living happened to become vacant during the young man's minority, for the patron to present a clergyman, who entered into an agreement to resign as soon as the patron's son should be of age to hold the preferment. These contracts were usually made by way of bond, conditioned to resign on the contingency happening, and which, from the nature of the transaction, acquired the name of *Resignation Bonds*. At first a doubt was entertained whether these bonds did not offend against the provisions of the Act of Elizabeth, since the clergyman who executed such an instrument could hardly be said to have been presented gratuitously, inasmuch as he agreed to bind himself in a penal sum as a condition precedent to his obtaining the preferment, and inasmuch as, in the case of his refusing to resign, and allowing the penal sum to be forfeited, he actually would have given up that sum of money for the sake of holding the living. However in *Johnes v. Lawrence* (v) first the King's Bench, and then the Exchequer Chamber, decided that such an instrument was good: and the reason assigned for this was, that a

(v) Cro. Jac. 248.

[*287] father is bound by *nature to provide for his son; and therefore that, though the clergyman was presented under an agreement, yet it was not an agreement upon any corrupt consideration, but more resembled the case of a bond to resign in case of non-residence or of taking any other living, which had both been decided to be for the good of the public, and free from any objection on the score of simony. But still another question remained, for in course of time it became usual to extract from the clergyman a bond conditioned to resign—not on the patron's son or any other particular person becoming qualified to hold the living—but to resign *generally* at the request of the patron whenever he should think proper to signify it. These bonds, which were called *General Resignation Bonds*, stood, it is obvious, on a different footing from the former ones, for they reduced the clergyman to a state of complete dependence on the will and pleasure of the patron. However, in *Ffytche v. The Bishop of London* (x), which was finally decided in the year 1783, first the Court of Common Pleas, and then that of the King's Bench, decided that such bonds were valid. But on a writ of error to the House of Lords, that decision was reversed by a majority of lay peers voting against the expressed opinion of a majority of the judges. After that period there was for a long time a strong [*288] *inclination on the part of the Courts to confine the authority of that decision of the peers to cases precisely similar to itself, as you will see from the judgments in *Bagshaw v. Bosley* (y), *Partridge v. Whiston* (z), *Newman v. Newman* (a). However, at last, in the year 1826, the matter came again before the House of Lords in the case of

(x) 1 East. 487.

(z) Ib. 359.

(y) 4 T. R. 78.

(a) 4 M. & Sel. 66.

Fletcher *v.* Lord Sondes (*b*), under the following circumstances.

An action was brought in the King's Bench by Lord Sondes against the Reverend William Fletcher upon a bond of £12,000. The condition was not to commit dilapidations, and to resign within a month after request the rectory of Kettering, in the county of Northampton, to which Lord Sondes then presented him, in order that his Lordship might be enabled to present one of two younger brothers whose names the condition specified. Upon this bond, judgment was allowed to go by default; and a writ of error being brought in the House of Lords, the judges were called on to deliver their opinions, which they all did, with the exception of Mr. J. Bayley, Mr. J. Holroyd, and Mr. J. Littledale. There was a difference of opinion amongst them, and they delivered their opinions therefore *seriatim*—the judges who thought the bond valid being, L. C. J. Best, Mr. J. Burrough, and Mr. J. Gaselee; those who thought it invalid being the L. C. J. *Abbott, C. B. Alexander, Mr. J. J. A. Park, B. Garrow, B. [*289] Graham, and B. Hullock. The Chancellor agreed with the majority, and the judgment of the Court below in favour of the plaintiff was reversed. Now, the bond in this case was not a general resignation bond. It was a special one in favour of the obligee's two brothers. And the effect of this decision was, not only to establish the decision in *The Bishop of London v. Ffytche*, but to overturn the decisions which had previously taken place in favour of special resignation bonds, and render all bonds conditioned for the resignation of a clergyman illegal. But as the consequences of this would have been exceedingly hard upon persons who had executed special resignation bonds at the time when they were

(*b*) 3 Bing. (11 E. C. L. R.) 501, in Dom. Proc.

looked upon as legal, the Archbishop of Canterbury immediately brought in a bill, which he laid on the table of the House as soon as the Lords had assented to the Chancellor's motion to reverse the judgment of the King's Bench in *Fletcher v. Lord Sondes*, and which afterwards passed into law. It is the 7 & 8 Geo. IV., c. 25, which confirms such bonds and contracts if made before the 9th of April, 1827, the day of the decision in *Fletcher v. Lord Sondes*, for resignation in favour of one, or one of two specified persons. And thus the law continued; all general bonds of resignation being void, and special ones in favour of one person, or one of two persons, good if before April 9th, 1827, and void if [*290] subsequent to that *day; until the passing of the 9 Geo. IV., c. 94, which rendered special resignation bonds and contracts entered into after the passing of that Act good, if in favour of one, or one of two persons standing in the relation of uncle, son, grandson, brother, nephew, or grand-nephew to the patron, by blood or marriage.

Thus stands this curious branch of law. Resignation contracts prior to April 9th, 1827, being governed by 7 & 8 Geo. IV., c. 25, conjointly with the statutes of Elizabeth and Anne; between that day and the passing of 9 Geo. IV., c. 94, by the statutes of Anne and Elizabeth, as explained in *Fletcher v. Lord Sondes*; and, subsequently, by the 9 Geo. IV., c. 94, in conjunction with the statute of Anne and Elizabeth.

Another class of illegal contracts, of not unusual occurrence, consists of those which are invalid, on the ground that they amount to illegal attempts to charge an ecclesiastical benefice. The obvious impolicy of allowing the provision made by law for the support of the church to be diverted to secular purposes, occasioned the enactment of the 13 Eliz., c. 20, which directs that

all *chargings* of benefices other than rents reserved upon the leases which the law allows to be made should be void. This act was repealed by 43 Geo. III., c. 84, but revived again by the repeal of the latter Act by 57 Geo. III., c. 99 (*c*). The cases have mostly arisen on *contracts made for the purpose of charging [*291] an annuity granted by a clergyman upon his benefice. These contracts are held void (*d*), and, where it appears on the face of a warrant of attorney given by a clergyman, that his intention in executing it was that the benefice should be sequestered towards the liquidation of an annuity or other charge, the Courts will set it aside (*e*); but they will not do so where no intention to create such a charge appears on the face of the warrant of attorney itself, though its effects may and probably will be to occasion an execution to issue, under which the profits of the benefice will be sequestered (*f*).

A contract may also be illegal by contravening the Statute which prescribes a uniformity of weights and measures in the United Kingdom. These are now regulated by 41 & 42 Vict., c. 49 (Weights and Measures Act, 1878), s. 19 of which expressly makes void all contracts not made in terms of imperial weights or measures where weight or measure is agreed for. S. 21, however, contains an *exception in favour [*292] of contracts in metric weights or measures, or

(*c*) *Shaw v. Pritchard*, 10 B. & C. (21 E. C. L. R.) 241. See 1 & 2 Vict. c. 106; *Hawkins v. Gathercole*, 6 De G. M. & G. 1; 24 L. J. (Ch.) 332.

(*d*) See *Mouys v. Leake*, 8 T. R. 411; *Alchin v. Hopkins*, 1 Bing. N. C. (27 E. C. L. R.) 99; *Flight v. Salter*, 1 B. & Ad. (20 E. C. L. R.) 673; *Walker v. Crofts*, 20 L. J. (Ex.) 257; 6 Ex. 1, S. C.

(*e*) *Saltmarshe v. Hewett*, 1 A. & E. (28 E. C. L. R.) 812; *Newland v. Watkins*, 9 Bing. (23 E. C. L. R.) 113. See *Hawkins v. Gathercole*, 24 L. J. (Ch.) 332.

(*f*) *Bendry v. Price*, 7 Dowl. 753; *Colebrook v. Layton*, 4 B. & Ad. (24 E. C. L. R.) 578; *Moore v. Ramsden*, 7 A. & E. (34 E. C. L. R.) 898; *Sloane v. Packman*, 11 M. & W. 770.

where decimal subdivisions of imperial weights and measures are used (*g*).

There is also a class of contracts which are illegal as being made by such a company as is declared illegal under s. 4 of the Companies Act, 1862 (25 & 26 Vict., c. 89). That section provides that “no company, association, or partnership consisting of more than ten persons shall be formed, after the commencement of this Act, for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent; and no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this Act (*h*) for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in [*293] pursuance of some other Act of Parliament,*or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the stannaries.” Under this section a loan society which consisted of more than twenty members, and whose object was to lend money at interest to some of its members, whilst other members furnished the money so to be lent and received interest, was held illegal. For although the society itself might not gain, yet the lending members did, and each member had the possibility of acquiring a gain. It therefore followed that the society itself being illegal,

(*g*) This statute would seem not to apply to contracts to be performed abroad, but only to contracts where the goods are to be weighed or measured in this country. See *Rosseter v. Cahlmann*, 8 Ex. 361; 22 L. J. (Ex.) 128, a decision under 5 & 6 Will. 4, c. 63, now repealed.

(*h*) See, as to what amounts to a company formed before the commencement of the Act, and which therefore does not require registration under it, *Shaw v. Simmons*, 12 Q. B. D. 117; 53 L. J. (Q. B.) 29.

the contract of loan, under which the money was both advanced and made repayable in pursuance of the rules of the society was illegal also. It was held, therefore, that neither the society nor its trustee could recover the money so lent, and that promissory notes given to secure such advances were equally invalid as being given for an illegal consideration (*i*).

* I have now touched upon the classes of con- [*294]
tracts invalidated by express enactment, which are of most frequent practical occurrence, and it remains to mention one point arising from a statute of the last reign, which has done away with a distinction which was formerly found an exceedingly troublesome one, and frequently very unjust in its operation.

You are probably aware that the general rule of the law of England was, until altered by recent legislation, that a *contract* was not *assignable*; that is, that a man who had entered into a contract could not transfer the benefit of that contract to another person, so as to put that other person in his own place, and entitle him to maintain an action upon it in case of its non-performance. That rule has indeed been altered by the Judicature Act of 1873, and an assignment of a contract or other chose in action is now valid if made in accordance with the provisions of that Act (*k*). But you are

(*i*) *Shaw v. Benson*, 11 Q. B. D. (C. A.) 563; 52 L. J. (Q. B.) 575. This case follows *Jennings v. Hammond*, 9 Q. B. D. 225; 51 L. J. (Q. B.) 493; which is a similar decision in the case of an unregistered benefit society with like objects to those of the society mentioned in the text. See also *In re Padstow Total Loss and Collision Assurance Association*, 20 Ch. Div. 137; 51 L. J. (Ch.) 344; *In re South Wales Atlantic Steamship Co.*, 2 Ch. Div. 763; 46 L. J. (Ch.) 177, where the companies were held illegal, not being registered under s. 4. In *Smith v. Anderson*, 15 Ch. Div. 247; 50 L. J. (Ch.) 39; an investment trust for a number of certificate holders, the trustees being under 20 in number, was held not to be within the meaning of s. 4, and therefore legal, though unregistered.

(*k*) By 36 & 37 Vict. c. 66 (Supreme Court of Judicature Act, 1873), s. 25, sub-sec. 6, "Any absolute assignment, by writing under the hand of the assignor

[*295] *probably also aware that there are some contracts which, irrespectively of the Judicature Act, 1873, are, by the operation either of a statute or of some peculiar rule of commercial law, exempted from the operation of the above rule, and rendered transferable in the same way as any other property from man to man.¹

Such are bills of exchange, which, by the law merchant are transferable by *endorsement*, if payable to order; by *delivery*, if payable to bearer. Such, too,

(not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor." See also *ante*, pp. *31, *238. There may be a valid assignment of a "debt or other legal chose in action" within the meaning of this enactment, although there is nothing actually due at the time of the assignment: *Brice v. Bannister*, 3 Q. B. D. 569; 47 L. J. (Q. B.) 722; *Buck v. Robson*, 3 Q. B. D. 686; 48 L. J. (Q. B.) 250; *Walker v. Bradford Old Bank*, 12 Q. B. D. 511; 53 L. J. (Q. B.) 280. See also as to what does or does not amount to an absolute assignment not purporting to be by way of charge only, *Burlinson v. Hall*, 12 Q. B. D. 347; 53 L. J. (Q. B.) 222; *National Provincial Bank v. Harle*, 6 Q. B. D. 627; 50 L. J. (Q. B.) 437; and for an instance of an assignment of the benefit of a contract subject to equities as between the assignor and the contractee, see *Young v. Kitchin*, 3 Ex. Div. 127; 47 L. J. (Q. B., etc.) 579. The notice of the assignment need not necessarily be given in the life time of the assignor: *Walker v. Bradford Old Bank*, *supra*.

¹ Corporation bonds payable to bearer, though under seal, have the qualities of negotiable instruments: *Mercer v. Hackett*, 1 Wall. 83; *Gelpcke v. Dubuque*, Ib. 175; *Meyer v. Muscatine*, Ib. 384; *Connecticut Ins. Co. v. Cleveland R. R. Co.*, 41 Barb. 9; *New Albany Plank Road Co. v. Smith*, 23 Ind. 353. Claims for property, and for tort done to property, are assignable, and such assignment may be by parol: *Jordan v. Gillen*, 44 N. H. 424; *Lazard v. Wheeler*, 22 Cal. 139. The assignment of a debt may be by parol, or may be inferred from the conduct and acts of the parties: *Spain v. Hamilton*, 1 Wall. 604. A right of entry for condition broken is not assignable: *Warner v. Bennett*, 31 Conn. 468.—s.

are promissory notes, which, by the statute 3 & 4 Anne, c. 9, were placed on the same footing as bills of exchange (*l*). Now, where some one of these *in- [*296]struments had been made upon an illegal consideration: where, for instance, a bill of exchange was accepted for an illegal gambling debt, it is obvious that no action could be maintained between the original parties to it; for instance, in the case I have just put, by the drawer of such a bill against the acceptor of it; for, as between them, it is the common case: they both knew of the illegality, and nevertheless, with their eyes open, made it the consideration of their contract. But where the instrument had gone out of the hands of the person to whom it was originally given, and had got into the hands of some third person, the case is very much altered; for he might not, and probably did not know of any illegality; and if he did not, it was hard that he should lose the benefit of that for which he had paid, in consequence of the illegal act of other persons, in which he did not participate, and of which he did not know. For instance, to take again the same example: A. loses £100 to B. at whist, and accepts a bill for the amount. If B. afterwards sues A. on that bill, and A. pleads the illegality, this, though not in conformity with the principles of honour, cannot be said to be a hardship upon B., for he knew when he sat down to play, and he knew when he drew the bill, that he could not enforce such a demand. But suppose, instead of himself suing on the acceptance, he had *procured [*297] C. to discount it, and had endorsed it to him, and C. had paid full value for it, and knew nothing of the gaming debt for which it was given, in such a case

(*l*) The statute of Anne has been repealed by 45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882), s. 96, Sch. II.; of which Act see Part IV. ss. 83–89, as to Promissory Notes; and s. 31, as to the transfer of Bills.

it would be an exceedingly hard thing indeed to prevent C. from recovering the amount from the acceptor. Yet, notwithstanding this, there were till lately several cases in which he would have been precluded from doing so.¹

The law stood thus:—Whenever illegality depended on the common law, or on an Act of Parliament which did not in express terms render the security *void*, *there* the Courts applied the rule which reason and justice dictate, and held that the person who had given value for the security, and had taken it without notice that it was affected by an illegality, was entitled to recover upon it. There were, however, some cases in which, by the positive enactments of particular statutes, the security was rendered *void*. Such, for instance, was an acceptance of the description I have just supposed, given for a gaming debt. Such, also, at one period, was a bill or note given upon an usurious consideration. But the hardship in the case of usury was found so great, that a particular Act (58 Geo. III., c. 93) was passed in order to put an end to it. And at length, stat. 5 & 6 Will. IV., c. 41, has altogether abolished the distinction and the grievances which it occasioned, by enacting that such instruments shall be no longer *void*, but shall be deemed and taken to have been given for [*298] an **illegal consideration*; the consequence of which is, that they are still void as between the original parties, and also as against all persons who have taken them with the notice of illegality, or after they had become overdue, or without giving value for them; but good in the hands of every person who has

¹ These cases were *Bowyer v. Bampton*, 2 Str. 1155; *Peacock v. Rhodes*, 2 Dougl. 636; *Lowe v. Waller*, Ib. 736; *Ackland v. Pearce*, 2 Camp. 599. The words of the usury and gaming acts were thought too strong to be got over, and the law has been held the same way under similar statutes on this side of the Atlantic: *Unger v. Boas*, 13 Pa. St. 602; *Lucas v. Waul*, 12 Sm. & M. 157.—R.

given value, and taken the instrument, before it was due and *bonâ fide*.¹

Although, since the passing of this statute, many alterations have been made in the law of gaming, yet the stat. 5 & 6 Will. IV., c. 41, is still in force (*m*), and the law is still as just described.

(*m*) 8 & 9 Vict. c. 109, s. 15. See Bayley on Bills, by Dowdeswell, 524. It has been held that bonds are within the equity of this statute: *Hawker v. Halliwell*, 3 Sm. & Giff. 194; 25 L. J. Ch. 558.

¹ The provisions of the statute 58 Geo. III., c. 98, were adopted in the New York Revised Statutes, v. 1, 772, § 5, under which act it has been obviously held, that as soon as the defendant shows there has been usury between the prior parties, he casts on the plaintiff the burden of proving that he is a holder for value: *Wyat v. Campbell*, M. & M. 80; *Hackley v. Sprague*, 10 Wend. 113; *Young v. Berkley*, 2 N. H. 410; *Williams v. Little*, 11 Ib. 66; *Hanrick v. Andrews*, 9 Port. 10; as is the case in every instance where fraud, duress, or illegality is shown between the prior parties: *Munroe v. Cooper*, 5 Pick. 412; *Vallett v. Parker*, 6 Wend. 615; *Beltzhoover v. Blackstock*, 3 Watts, 26; and it seems at one time to have been thought that if the defendant could prove *want* or *failure* (not an *illegality*) of consideration between the prior parties, this would throw on the plaintiff the burden of proving himself a holder for value: *Grant v. Vaughan*, 3 Burr. 1516; *Paterson v. Hardacre*, 4 Taunt. 114; *De la Chaumette v. Bank of England*, 9 B. & C. (17 E. C. L. R.) 208; *Heath v. Sansom*, 2 B. & Ad. (22 E. C. L. R.) 291; but in *Whitaker v. Edmunds*, 1 Moo. & Rob. 366 *Patterson, J.*, said, "Since the decision in *Heath v. Sansom* (2 B. & Ad. 291), the consideration of the judges has been a good deal called to the subject, and the prevalent opinion amongst them is, that the courts have of late gone too far in restricting the negotiability of bills and notes. If, indeed, the defendant can show that there has been something of a fraud in the previous steps of the transfer of the instrument, that throws on the plaintiff the necessity of showing under what circumstances he became possessed of it; so far I accede to the case of *Heath v. Sansom*, for there were in that case circumstances raising a suspicion of fraud; but if I added on that occasion that even independently of these circumstances of suspicion, the holder would have been bound to show the consideration which he gave for the bill, merely because there was an absence of consideration as between the previous parties to the bill, I am now decidedly of an opinion that such doctrine was incorrect." The opinion thus expressed has since been confirmed in many cases. See also *Heydon v. Thompson*, 1 A. & E. (28 E. C. L. R.) 210; *Low v. Chifney*, 1 Bing. N. C. (27 E. C. L. R.) 267; *Knight v. Pugh*, 4 W. & S. 448, where the reason for the change of decision is thus clearly given. "In cases other than those of negotiable notes obtained or put in circulation by fraud or undue means, the maker, by its negotiable character, agrees that the payee shall put it in circulation. He has no right, therefore,

There is one other point which I will notice before altogether leaving the head of illegality. I have hitherto spoken of illegality as avoiding a contract, and of course operating by way of defence to any action brought upon the contract which it affects. But put the case that an illegal contract has been in part performed—that money, for instance, has been paid in pursuance of it—*no action will lie to recover that money back again*. At an early period of the law it was thought that such an action might be perhaps maintainable upon the ordinary principle, that an action will lie to recover back money which has been paid on a [*299] consideration *which has failed. Thus, for instance, in the common case of an insurance, supposing that I insure a ship during a voyage and she never sails upon it, I should be entitled to recover back the money as paid upon a consideration which had failed: for the consideration for my paying the premium was the risk the underwriter was to take upon himself; but as the risk was to be contemporaneous with the voyage, and as that never commenced, so neither did the risk, and, consequently, nothing was ever given in exchange for the money. So, in the ordinary case of an action for a deposit. If A. sells an estate to B., B. paying a part of the purchase-money as a deposit, if A. afterwards prove unable to make out a title, B. may recover back the money deposited for the consideration; for the sale has become abortive. Such are the common cases, and the common rule: where money has been paid upon a consideration which totally fails, an action will lie to recover it back again. But it is otherwise where the contract was an illegal one. Where money is paid in pursuance of an illegal contract, the considera-

to complain of his own act; and a holder placing confidence in such paper, ought not to be compelled to prove consideration.—R.

tion of course fails, for it is impossible for the party who has paid the money to enforce the performance of the illegal contract. Still, no action will lie to recover it back again. The reason of this is, that the law will not assist a party to an illegal contract. He has lost his money, it is true, but he has lost it by his own folly in entering into a transaction which the law forbids. You will see *instances of this in the cases cited [*300] below (*n*), the last but one of which, *Lubbock v. Potts*, is the very case I put, that of an insurance, in which, if the risk be not run, the premium may be recovered back again; but in that case the insurance was an illegal one, and it was therefore held that, though it could not have been enforced, the insured should not recover back the premium. The point is forcibly put by L. C. J. *Wilmot*, in his celebrated judgment in *Collins v. Blantern*, which I have several times cited from 2 Wilson, 341. "Whoever," says his Lordship, "is a party to an unlawful contract, if he have once paid the money contracted to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again. You shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back."¹

To this rule, however, there are two exceptions: The first is, *where the illegality is created by some statute, the object of which is to protect one class of men against another*, or where the illegal contract has been extorted

(*n*) *M'Kinnell v. Robinson*, 3 M. & W. 441; *Howson v. Hancock*, 8 T. R. 575; *Browning v. Morris*, Cowp. 790; *Lubbock v. Potts*, 7 East, 449; *Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491, 1 Q. B. D. (C. A.), 679; 44 L. J. (Q. B.) 233.

¹ The familiar maxim applies, "*In pari delicto, po'ior est conditio defendentis*;" and instances of its application may be found in *Worcester v. Eaton*, 11 Mass. 368; *Merwin v. Huntington*, 2 Conn. 209; *Perkins v. Savage*, 15 Wend. 412, and in many other cases: *White v. Hunter*, 23 N. H. 128.—R.

from one party by the oppression of the other. In cases of this sort, although the contract is illegal, and although a person belonging *to the class *against* [*301] whom it is intended to protect others cannot recover money he has paid in pursuance of it, yet a person belonging to the class to be protected may, since the allowing him to do so renders the Act more efficacious. You will see this proposition illustrated by the case of *Smith v. Bromley* (o), which turned on the application of one of the old Bankrupt Acts. That Act, to prevent practices on bankrupts who had not obtained their certificates, and who for the sake of obtaining them were likely to be willing to submit to any terms, however hard, that might be imposed upon them, vacated all securities given by the bankrupt or any one on his behalf, in consideration of the signature of the certificate. A creditor refused to sign the certificate unless a sum of money was paid him by a friend of the bankrupt's, and, the money having been paid, it was held that the person who paid it might recover it back again. In like manner one of the old Lottery Acts forbade, under a penalty, the ensuring of lottery tickets. The plaintiff had paid a sum of money to the lottery office keeper as premiums for the purpose thus forbidden, and was held entitled to recover it back as money received to his use (p). The Acts against usury (now repealed) made the taking money, reward, or promise of reward, by the informer or plaintiff suing for the penalties of usury, *in order to compound with any person [*302] offending against those laws, very highly penal: the object being to prevent the person so offending from being harassed by vexatious actions and informations. It was therefore held, that, where the defendant had in

(o) 2 Dougl. 696, note.

(p) *Jacques v. Gollightly*, 2 Bl. 1073; *Jacques v. Withy*, 1 H. Bl. 65.

a former action sued the plaintiff for the penalties of usury in a transaction with another person, and the plaintiff had, in order to get rid of that penal action, compounded with the defendant, by paying him a large sum of money, he might recover it back from the defendant, the prohibition against compounding such actions being made for the protection of the party sued in them. The Court considered, that, although the plaintiff was guilty of usury and liable to the penalties for usury, he was not liable to be harassed by actions commenced for the purpose of being compounded. His criminality was collateral to the offence of compounding; his consciousness of his usurious dealings and dread of the consequences laid him at the mercy of the defendant, and enabled the latter to effectuate an act of extortion by procuring the payment of a sum of money; and in respect of the criminal offence of compounding, the plaintiff was the person whose situation was taken advantage of against the object of the statute, which, for his protection, made such compounding illegal (*q*).

*Very similar to the case of *Smith v. Bromley*, above cited, is that of *Smith v. Cuffe* (*r*), [303] where the defendant, who was a creditor of the plaintiff, entered into an agreement with the plaintiff and the other creditors, to accept a composition of 10s. in the pound on the debts due to them from the plaintiff. The defendant would not enter into this agreement except upon the consideration that the plaintiff should give him his promissory note for the remainder of his debt. The note was given, the 10s. in the pound paid, the defendant passed away the note, and the owner compelled

(*q*) *Williams v. Hedley*, 8 East, 378.

(*r*) 6 M. & Selw. 160; *Atkinson v. Denby*, 31 L. J. (Ex.) 362; 7 H. & N. 934, Ex. Ch.

the plaintiff to pay it. The Court decided that the plaintiff might recover back from the defendant the amount of the note so paid. In this case it was strongly argued, that, both parties having been guilty of a fraud upon the creditors, the case was within the rule *in pari delicto potior est conditio defendentis*; but Lord *Ellenborough* said, "this is not a case of *par delictum*, but of oppression on one side, and submission on the other; it can never be predicated as *par delictum*, when one holds the rod, and the other bows to it; there was an inequality of situation between these parties—one was creditor, the other debtor, who was driven to comply with the terms which the former chose to enforce. And is there any case, where, money having been obtained extorsively and by oppression, and in fraud of the [*304] *party's own act as it regards the other creditors, it has been held that it may not be recovered back? On the contrary, I believe it has been uniformly decided, that an action lies."

This case has been approved and acted on in the more recent case of *Horton v. Riley* (s), where the defendant, being a creditor of the plaintiff, entered into a similar agreement to that in *Smith v. Cuffe*, with the plaintiff and the other creditors; but at the same time agreed privately with the plaintiff himself, that the excess of his debt beyond the composition should be secured to him by the joint promissory note of the plaintiff and two sureties, which note the defendant agreed to keep in his own hands. The note was given, but the defendant negotiated it, and the holder enforced payment from the plaintiff. Under these circumstances, the plaintiff, if sued by the defendant upon the note, would have had a good defence against him. Of this defence he was deprived by the defendant's having handed the

(s) 11 M. & W. 492. See *Fraser v. Pendlebury*, 31 L. J. (C. P.) 1.

note over, whereby the plaintiff was compelled to pay the money, and he had therefore a right to recover it back from the defendant. "The agreement in this case," said Lord *Abinger*, "makes it a stronger case even than *Smith v. Cuffe*, and I see no reason why we should depart from that decision."

*The other exception is, that, *when money has been paid in, or goods delivered, under an unlawful agreement, but there has been no further performance of it, the party paying the money or delivering the goods may repudiate the transaction and recover back his money or goods* (t). It is obvious that in this case to allow the money or goods to be recovered is to allow a *locus pœnitentiæ* within which the illegal contract may be repented of and not completed at all. [*305]

The true test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires any aid from the illegal transaction to establish his case. [*306] If he cannot make out his claim except through an illegal transaction, *e.g.*, if he is suing for money paid, and cannot present his case without necessarily disclos-

(t) *Taylor v. Bowers*, 1 Q. B. D. 291; 45 L. J. (Q. B., etc.) 163; 46 Ib. 39. See also *Wilson v. Strugnell*, 7 Q. B. D. 548; 50 L. J. (M. C.) 145. There, a sum of money was paid to the defendant, who became bail for one M. on a charge of embezzlement, to indemnify him against his liability as bail. This is an illegal contract as contrary to public policy. But before the recognizance had been forfeited, it was held that M.'s trustee (M. having in the meantime become bankrupt) could recover the sum paid from the defendant. In former editions the exception was stated as follows:—"When money has been paid in pursuance of an illegal contract, but paid not to the other contracting party but to a stakeholder, then either party may recover it back again." This seems unnecessarily narrow; see *Taylor v. Bowers* above cited and the authorities there referred to in the judgment of *Cockburn, C. J.* We have already seen (*ante*, p. *279) that, in the case of a stakeholder, where the contract is void as being a wager, the depositor of a stake may at any time, whether before or after the determination of the event on which the wager depends, provided the money be not paid over, demand back and recover his stake from the stakeholder.

ing the unlawful purpose in furtherance of which the money was paid, he cannot recover (*u*).

I have now done with the contract itself. I have stated the various points relating to the contract itself, the consideration, and the effect of illegality on either. In the next Lecture I shall speak of the parties to it.

(*u*) *Simpson v. Bloss*, 7 Taunt. (2 E. C. L. R.) 246; *Fivaz v. Nicholls*, 2 C. B. (52 E. C. L. R.) 501; *Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491, 1 Q. B. D. (C. A.) 679; 44 L. J. (Q. B.) 233; *Taylor v. Bowers*, *supra*.

PARTIES TO CONTRACTS.—INFANTS.—MARRIED WOMEN.

THE next branch of the subject relates to the *parties to the contract*. Now, this you will at once perceive, involves a double consideration.

First, regarding the *ability* of the parties to the contract to contract at all.

Secondly, regarding their ability to enter into this or that particular sort of contract; for (as I shall have to explain more at length to you) there *are* persons who are allowed by the law to contract, but are not allowed to contract in the same way as an ordinary individual; for instance, a corporation may contract *by deed*, but cannot, except in certain cases which I shall presently specify, contract in any other manner.¹ However, although these two considerations are in themselves distinct, yet I think the better and more intelligible plan will be to deal with both of them together, specifying one by one, those classes of persons regarding whose power to contract the law contains any particular provisions, and pointing out, while treating upon each of them, in what cases they are disabled from entering into any contract, and in what cases, although allowed *to contract, they are obliged to do so in a particular form. [*308]

Now, I need hardly tell you that, *primâ facie* any subject of the realm has power to enter into any contract not rendered illegal by the provisions of the statute or common law; and, therefore, the cases to which I am now to advert are cases of complete or partial *disability*, cases in which a contract, which would have

¹ *Vide infra*, pp. *370 *et seq.* and notes.

been good if entered into by an ordinary individual, is, when entered into by some particular individual, invalid, because that individual happens to fall within a class of persons who either do not possess *ability* to contract at all, or do not possess ability to contract in that particular way.

The first of these classes of persons to which I shall advert, is that of *Infants*.

The general principle which regulates this branch of the law is, that until an individual has attained the age of twenty-one, which period the law has selected as that at which a person of average capacity may fairly be supposed to have attained sufficient experience to render his natural faculties fully available in the practical business of the world, it is necessary to shield him from the dangers of becoming a prey to others willing to take an advantage of his inexperience; and as there are no means of doing this except by placing him under a limited disability to contract, he is accordingly placed under such limited disability. But [*309] *inasmuch* as to place him under a *total* disability might have the effect of preventing him from attaining objects not only not detrimental, but of the utmost advantage to him, he is, in order to avoid this risk, permitted to bind himself to a certain extent, since otherwise he might be unable to obtain food, clothes, or education, though certain to possess at no very distant period the means of amply paying for them all.

The general principle therefore is, that an infant may bind himself by a contract for what the law considers *necessaries*, but not by any other contract. We will consider, therefore, what it is that the law comprises under this denomination.

Now, it is well established by the decisions, that under the denomination *necessaries* fall not only the food, clothes, and lodging necessary to the actual support of

life, but likewise means of education suitable to the infant's degree, and all those accommodations, conveniences, and even matters of taste, which the usages of society for the time being render proper and conformable to a person in the rank in which the infant moves. The question *what* is conformable—*what* is, in the legal sense of the word, *necessary*—is, in each case, to be decided by a jury; but these are the principles by which the judge ought to direct the jury that their decision should in each particular case be guided. Though however the question of “necessaries” or “not necessaries” is one of fact and therefore for the *jury; yet like all other questions of fact, it should not be left [*310] to the jury by the judge unless there is evidence on which they can reasonably find in the affirmative. If there is not, the judge ought to withdraw the question from the jury (a).¹ It is impossible, however, to understand this subject practically, so as to be able to say with tolerable certainty what would be the decision on this or that particular case, except by a familiarity with similar ones. I will therefore refer you to a number of decided cases, containing, in my judgment, the best illustrations of the matter.

(a) *Ryder v. Wombwell*, L. R., 4 Ex. 32; 38 L. J. (Ex.) 8 (Ex. Ch.) reversing *S. C.*, 3 L. R., Ex. 90; 37 L. J. (Ex.) 48.

¹ In a very learned modern work on contracts the law on this point is thus clearly summarized: “When it is sought to enforce a contract against an infant on the ground that it was for necessaries, then the *primâ facie* necessity of the commodities supplied is a question for the court. If the court holds them not *primâ facie* necessary, evidence may be given of special circumstances rendering them in fact necessary, and the sufficiency or otherwise of such evidence is a question for the court. Subject as above, the necessity of the commodities in fact is a question for the jury. Commodities of a description in itself necessary are [probably] not necessaries when the buyer is already supplied with as much of the like commodities as he can reasonably want.” Pollock on Contracts, 52. In view of the subsequent case of *Barnes v. Toye*, 13 Q. B. D. 410 (*infra* p. *315 and note), the qualifying word inserted in the last sentence may be omitted, at least so far as the English law is concerned.

The two cases of *Peters v. Fleming* (*b*), and *Harrison v. Fane* (*c*), in one of which the infant was held liable, and in the other not, appear to me to furnish good examples of the distinctions of which I am speaking.

(In *Peters v. Fleming*, the plaintiff, who was a jeweller, brought an action of debt against an infant who pleaded his infancy by way of defence; the plaintiff replied that the goods, for the price of which he sued, were *necessaries* suitable to the estate, degree, and condition in life of the infant; on which issue was joined, and the question to be tried was, whether they were or were not so. It turned out that the infant was the eldest son of a member of Parliament, who was, also, a gentleman *of fortune, and that the infant was an [*311] undergraduate of the University of Cambridge, and resided at the University. The articles supplied were four rings, a gold watch-chain, and a pair of breast-pins. The jury found that these articles were necessaries, and a motion was made to set aside the verdict as contrary to evidence. The Court of Exchequer, however, refused to interfere. Baron *Parke* said,—“ It is perfectly clear, that, from the earliest time down to the present, the word *necessaries* was not confined to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree of life in which he is; and therefore, we must not take the word ‘*necessaries*’ in its unqualified sense, but with the qualification above pointed out. The question, therefore, is, whether there was any evidence to go to the jury that any of these articles were of that description. I think there are two that might fall under that description, namely the breast-pin and the watch-chain. The former might

(*b*) 6 M. & W. 42.

(*c*) 1 M. & Gr. (39 E. C. L. R.) 550.

be a matter either of necessity or of ornament. The usefulness of the other might depend on this, whether the watch was necessary? If it was, then the chain might become necessary itself. Now, it is impossible that a judge could withdraw from the consideration of a jury whether a watch was necessary for a young man at college, and of the age of eighteen or nineteen, to have. That being so, it is equally, as far as the *chain is concerned, a question for the jury. There [*312] was therefore evidence to go to the jury. The true rule I take to be this, that all such articles as are *purely* ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one, and for such matters therefore an infant cannot be made responsible. But if they were not strictly of this description, then the question arises whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved. If they were, for such articles the infant may be made responsible."

On the other hand, in *Harrison v. Fane* (d), an action was brought by a livery stable-keeper for the hire of horses; the defendant pleaded infancy, and the plaintiff replied that the horses furnished were necessary for the infant, upon which issue was joined. It turned out, on the trial, that the defendant was the younger son of a gentleman who had once been a member of Parliament, and who had a family of five children. The defendant, the infant, kept a horse of his own, and sometimes hunted with his father's hounds. Under these circumstances the judge who tried the

(d) 1 M. & Gr. (39 E. C. L. R.) 550. See, however, the decision of the Court of Exch. Ch. in *Ryder v. Wombwell*, cited *ante* p. *310, as to the duty of the judge to withdraw the question from the jury in the absence of evidence on which they could reasonably find that the articles were necessities.

[*313] cause thought that the horses *were not necessities, and directed the jury accordingly; but the jury thought proper, nevertheless, to find their verdict for the plaintiff. The Court considering it a perverse one, and contrary to law, set it aside, the L. C. J. observing that he would not say that horses could not be necessities under any circumstances, but that no evidence was given that they were so in the present case.¹ With regard to the L. C. Justice's remark, I

¹ The result of the cases on both sides of the Atlantic seems to be, that unless the articles are, both as to quality and quantity, such as must be necessities to any one, the burden of proof lies on the plaintiff to show such a condition of life of the defendant as might raise to the rank of necessities, things which would otherwise be luxuries: *Brooker v. Scott*; *Wharton v. M'Kenzie*; *Rainwater v. Durham*, 2 N. & Mc. 524; *Rundle v. Keeler*, 7 Watts, 239; *Phelps v. Worcester*, 11 N. H. 51; *Bent v. Manning*, 10 Vt. 225; *Grace v. Hale*, 2 Humph. 27. When this has been shown, the question whether the articles *are* necessities, is one for the jury, subject, however, in some cases, to the direction of the Court, as, for instance, as was said in *Wharton v. M'Kenzie*, *supra*, "Suppose the son of the richest man in the kingdom to have been supplied with diamonds and race-horses, the Judge ought to tell the jury that such articles cannot possibly be necessities." And it would also seem that the articles must be to supply *personal* wants either for the body or mind; expenditures, therefore, for other purposes, as, for example, for alterations in an infant's real estate, however requisite, can never be considered as necessities, they being regarded in the same light as articles furnished him for trade, the price of which cannot, as will be presently seen, be recovered as necessities, however beneficial they may be to the business: *Tupper v. Cadwell*, 13 Metc. 559. And even in cases where there can be no doubt that the articles are proper and necessary in themselves, yet as an overplus of goods, otherwise proper, ceases to be a supply of necessities as to the excess, the jury should be directed to find for no more than is absolutely necessary, unless there is evidence to justify the quantity: *Johnson v. Lines*, 6 W. & S. 84.—R.

The board of an infant is included among the necessities, for which he may pledge his credit: *Bradley v. Pratt*, 23 Vt. 378. Circumstances may exist which would render a home suitable to an infant's fortune and station in life: *Aaron v. Harley*, 6 Rich. 26. An infant who has an allowance from the Court or any other source, of a sum sufficient to supply himself with necessities, suitable to his fortune and condition is not liable ordinarily for necessities supplied on credit: *Rivers v. Gregg*, 5 Rich. Eq. 274. Where it appears that a minor has been furnished with money enough to procure all necessities, the law presumes that he has been fully supplied, and the plain-

feel no difficulty in putting a case in which a horse might be considered necessary. Suppose, for instance, the infant were a young man in a genteel station of life, and had been ordered horse exercise by a medical attendant.

Thus, in a case subsequently decided (*e*), soda water, oranges, and jellies, for an infant undergraduate at college, were held, *primâ facie*, not to be necessities, though they might have been shown to have been so.

"This," said Mr. Baron *Parke*, "is the case of a young man resident in the town, and having from his college everything necessary for a person *in statu pupillari*." Had there been evidence that his medical attendant recommended them, they would undoubtedly

(*e*) *Brooker v. Scott*, 11 M. & W. 67.

tiff must negative that presumption. And if it appears that he has been furnished at other places, at or about the same time, those who supplied him first have a prior right to be paid: *Nicholson v. Wilborn*, 13 Ga. 467. Whether certain articles furnished a minor were necessities or not is generally a question of fact for the jury, depending on all the circumstances of the case; the two principal circumstances being whether the articles were suitable to the minor's estate and condition, and whether he is without other means of supply: *Davis v. Caldwell*, 12 Cush. 512. If an infant is under the care of a parent or guardian, who has the means and is willing to furnish him what is actually necessary, he can make no contract for any article that will bind him: *Elrod v. Myers*, 2 Head, 33. A contract for the insurance of his property against loss or damage by fire is not a contract for necessities: *New Hampshire Ins. Co. v. Noyes*, 32 N. H. 345. Nor is a contract to repair his estate: *West v. Gregg*, 1 Grant, 53; *Tupper v. Cadwell*, 12 Met. 562. As to what are necessities see *Merriam v. Cunningham*, 11 Cush. 40; *Sams v. Stockton*, 14 B. Mon. 232; *Freeman v. Bridger*, 4 Jones, 1; *Wilhelm v. Hardman*, 13 Md. 140. An infant may bind himself to pay for necessities he obtains so much as they are reasonably worth, but not what he may foolishly have agreed to pay for them: *Locke v. Smith*, 41 N. H. 346; *Squier v. Hydliſſ*, 9 Mich. 274. A minor is liable for money paid at his request by the plaintiff to a third person for necessities furnished him: *Swift v. Bennett*, 10 Cush. 436. Payment to a minor under a contract for services made directly with him, but with the knowledge of the parent is a good defence to an action brought by the parent to recover for such services: *Nixon v. Spencer*, 16 Iowa, 214. See also *Munson v. Washband*, 31 Conn. 303; *Robinson v. Weeks*, 56 Me. 102.—s.

have been considered necessities (*f*). The case of *Hands v. Slaney* (*g*), also well illustrates both [*314] *these propositions, for in that case it was held that a captain in the army, under age, was liable for a livery, ordered by him for his servant, but not for cockades given to the soldiers of his company. Lord *Kenyon* thought it was proper for a gentleman in the defendant's situation to have a servant, and if proper to have a servant, that the servant should have a livery, but that the cockades could not be necessities. In one of the most recent cases on the subject, *Ryder v. Wombwell* (*h*), it was held that there was no evidence of either a pair of jewelled solitaires worth £25, or an antique goblet, intended for a present, worth £15 15s., being necessities for an infant, the son of a baronet, with no independent establishment, and in the receipt of an allowance of £500 a year; that the question, therefore, of "necessaries" or not ought not to be left to the jury, but a nonsuit directed. If the articles supplied to the infant are in their own nature necessities, considering the infant's degree and station, it is immaterial that he had such an *allowance* paid to him as might have enabled him to pay ready money for them (*i*). But articles which are *prima facie* of the class of necessities may be taken out of that class by evidence that the infant was at the time when the order [*315] was given already sufficiently supplied with *goods of a similar description. A tradesman therefore, who wishes to be safe, should before supplying an infant with goods, make inquiries as to the degree in which he is already supplied with goods of the

(*f*) *Wharton v. Mackenzie*, 5 Q. B. (48 E. C. L. R.) 606.

(*g*) 8 T. R. 578; *Coates v. Wilson*, 5 Esp. 152.

(*h*) In Ex. Ch., L. R. 4 Ex. 32, 38 L. J. (Ex.) 8, reversing *S. C.*, L. R. 3 Ex. 90, 37 L. J. (Ex.) 48.

(*i*) *Burghart v. Hall*, 4 M. & W. 727. [But see note 1, p. *313.]

like kind, for if he is, the tradesman cannot recover, whether he knew or not of the existing supply (*k*).¹

It has always been considered that necessities for an infant's wife and children are necessities for himself (*l*),² a doctrine which, together with that of an infant's liability generally, is so fully and clearly explained in the judgment of the Court of Exchequer, in the case of *Chapple v. Cooper* (*m*), that it deserves to be carefully studied. "It seems clear," said Mr. Baron *Alderson*, delivering the judgment of the Court, "that an infant can contract so far as to bind himself in those cases where it is necessary for him to have the things for which he contracts; or where the

(*k*) *Barnes v. Toye*, 13 Q. B. D. 410.

(*l*) *Turner v. Trisby*, 1 Str. 168.

(*m*) 13 M. & W. 252.

¹ In the case of *Barnes v. Toye*, *supra*, the Queen's Bench Division dissented from *Ryder v. Wombwell*, L. R. 3 Exch., 90, 4 Ib. 35, upon this point. In the latter case the Court of Exchequer were of the opinion that even if the infant were supplied already with articles of the class furnished, and which were *primâ facie* necessities, a tradesman who was ignorant of this fact could recover. But in the later case it was pointed out that this would make the protection thrown about an infant by the law dependent upon the state of knowledge of the party he was dealing with, and the Court refused to follow it (*Manisty, J., dubitante*).

In *Nichol v. Steger*, 2 Tenn. Ch. 328, *Cooper, Ch.*, said, "Nothing is clearer than that an infant cannot bind himself or his estate even for necessities, if they are furnished him by his guardian. . . . Nor can it make any difference that the person who deals with the infant is not aware of the fact that he was an infant and had a guardian. It is his duty to inquire. . . . And the very fact that the infant has an ample estate is a strong reason for adhering to the general rule." See the authorities cited in this case. In *Johnson v. Lines*, 6 W. & S. 80, *Gibson, C. J.*, held that an over-supply of an infant's wants, though the articles might in other respects be ranked as necessities, gives a demand against him only for so much as was actually needed; and it is the tradesman's duty to acquaint himself with the infant's circumstances and necessities, as well as to take notice of supplies by other tradesmen.

² So, indeed, an infant marrying an adult wife became liable on her contracts whether for necessities or otherwise; for her contracts are valid, being made by an adult, and the husband's liability is an incident of the marriage contract, which is one that the law allows the infant to make: *Butler v. Breck*, 7 Metc. 164; *Roach v. Quick*, 9 Wend. 238.—R.

contract is, at the time he makes it, plainly and unequivocally for his benefit. It is with the former class that we are concerned. Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, [*316] moral, and religious information may be a *necessary also. Again, as man lives in society, the assistance and attendance of others may be a necessary to his well-being. Hence, attendance may be the subject of an infant's contract. Then the classes being established, the subject-matter and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill; and the medicines will depend on the illness with which he is afflicted, and the extent of his probable means when of age. So, again, the nature and extent of the attendance will depend on his position in society; and a servant in livery may be allowed to a rich infant, because such attendance is commonly appropriated to persons in his rank of life. But in all these cases it must be first made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, articles of *mere* luxury are always excluded, though luxurious articles of utility are in some cases allowed. So, contracts for charitable assistance to others, though highly to be praised, cannot be allowed to be binding, because they do not relate to his own personal advantage. In all cases there must be personal advantage from the contract derived to the infant himself. It is

manifest, we think, that this principle alone would not be sufficient to *decide the present case. For it [*317] would be difficult to say that there is any personal advantage necessarily derived to an infant from the mere burial of a deceased person. But there is another consideration which arises out of the circumstances of this case, which may, we think, materially affect the defendant's liability. This is the case of an infant widow, and the burial that of her husband, who has left no property to be administered. Now, the law permits an infant to make a valid contract of marriage; and all necessities furnished to one with whom he becomes one person by or through the contract of marriage are, in point of law, necessities to the infant himself. Thus a contract for necessities to an infant's wife and lawful children is used by Lord *Bacon* as one of the illustrations of the maxim '*Persona conjuncta æquiparatur interesse proprio*' (n). 'If a man,' says Lord *Bacon*, 'under the years of twenty-one contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliment or erudition.' Now there are many authorities which lay down that decent Christian burial is a part of a man's own rights; and we think it is no great extension of the rule, to say that it may be classed as a personal advantage, and reasonably necessary to him. His property, if he leaves any, is liable to be appropriated by his administrator to the *performance of this proper ceremonial. If, then, [*318] this be so, the decent Christian burial of his wife and lawful children, who are the persons *conjunctæ* with him, is also a personal advantage, and reasonably necessary to him; and then the rule of law implies that he may make a binding contract for it. This seems to

(n) Bac. Law Maxims, r. 18—Broom's Maxims, 533, 5th edit.

us to be a proper and legitimate consequence, from the proposition that the law allows an infant to make a valid contract of marriage. If this be correct, then an infant husband or parent may contract for the burial of his wife or lawful children; and then the question arises whether an infant widow is in a similar situation. It may be said that she is not, because during the coverture she is incapable of contracting, and, after the death of the husband, the relation of marriage has ceased. But we think this is not so.

“In the case of the husband the contract will be made after the death of the wife or child, and so after the relation which gives validity to the contract is at an end to some purposes. But if the husband can contract for this, it is because a contract for the burial of those who are *personæ conjunctæ* with him by reason of the marriage, is as a contract for his own personal benefit; and if that be so, we do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit. Her coverture is at an end, and so she may contract; [*319] and her infancy is, for the above *reasons, no defence, if the contract be for her personal benefit.

“It may be observed, that as the ground of our decision arises out of the infant’s previous contract of marriage, it will not follow from it that an infant child or more distant relation would be responsible upon a contract for the burial of his parent or relative.”

More recently, it has been held, in strict conformity with this reasoning, that as the contract of marriage is one which it is competent for an infant to enter into, a proper marriage settlement upon an infant lady, even of the property of her intended husband, might justly be considered necessary and suitable to her state and

condition; and that consequently the preparation of such settlement was beneficial, and a contract for preparing it was binding upon her (*o*).

There are, however, some species of contracts which the law considers it so imprudent on the part of an infant to enter into, that it will not allow him to bind himself by them under any circumstances. For instance, an infant cannot *trade*, and consequently cannot bind himself by any contract having relation to trade. We know, by constant experience, that infants *do* in fact trade, and trade sometimes very extensively. However, there exists a conclusive presumption of law that no infant under the age of twenty-one has discretion *enough for that purpose. You will see this laid down in *Whywall v. Champion* (*p*), *Dilk v. Keighley* (*q*). He may, therefore, recover back in an action for money had and received a sum which, while an infant, he had paid towards the purchase of a share in the defendant's trade (*r*), not having actually received any profit or benefit from the business (*s*). If he has obtained such profit, or has derived advantage from the business, so that he cannot put the defendant in the same situation in which he would have been had the contract not been made, he cannot recover back the money (*t*). Some singular consequences follow from this general rule; for instance, a bill of exchange is a mercantile contract, deriving, as I had occasion to explain in the last Lecture, its peculiar and distinguishing qualities from the law merchant. An infant, therefore,

(*o*) *Helps v. Clayton*, 34 L. J. (C. P.) 1.

(*p*) Str. 1083.

(*q*) 2 Esp. 480.

(*r*) *Corpe v. Overton*, 10 Bing. (25 E. C. L. R.) 252.

(*s*) *Holmes v. Blogg*, 8 Taunt. (4 E. C. L. R.) 508.

(*t*) *Corpe v. Overton*, *supra*; *Holmes v. Blogg*, *supra*; *Ex parte Taylor*, in *re Burrows*, 25 L. J. (Bptcy.) 35.

as *he* cannot be a merchant, is not allowed to bind himself by becoming a party to such an instrument; and thus, although a young man under the age of twenty-one may bind himself by a contract to pay money for his necessary dress, living, or education, yet, if he accept a bill for the price of these very articles, it will not bind him, although by accepting the bill, he in fact would [*321] rather gain an advantage, inasmuch as he *would be entitled to credit during the time the bill had to run (*u*).¹

(*u*) *Williams v. Harrison*, Carth. 160; *Williamson v. Watts*, 1 Camp. 552; *Harrison v. Cotgreave*, 4 C. B. (56 E. C. L. R.) 562; 16 L. J. (C. P.) 198.

¹ Although in *Ayliff v. Archdale*, Cro. Eliz. 920, a distinction was taken between a bond with a *penalty*, given for necessities, and an obligation for the exact sum, yet it has been since repeatedly held, that an infant is neither liable upon a bond, bill, or note, given for necessities, nor upon an agreement to pay a certain sum for them, on the ground that the infant is not to be precluded by the form of the contract, from his right of showing the actual worth of the articles: *Earle v. Peale*, Salk. 386, pl. 2; *Probart v. Knouth*, 2 Esp. 472 n.; *Beeler v. Young*, 1 Bibb, 519; *McCrillis v. Howe*, 3 N. H. 348; or, as it should be more correctly said, because the only contract on which an infant is liable, is the *implied* contract for necessities: *Roof v. Stafford*, 7 Cow. 182; *Tucker v. Moreland*, 1 Am. L. C. 244. Nor is he liable for money lent to enable him to procure necessities, on the ground that the contract arises upon the lending; and the subsequent application of the money for necessities, cannot, by matter thus *ex post facto*, make the contract binding: *Earle v. Peale*; *Walker v. Simpson*, 7 W. & S. 88. In equity, however, it is considered that where the money is thus actually applied, the lender may stand in the place of the infant's creditor, who has been satisfied, and be subrogated to his rights: *Marlow v. Pitfield*, 1 P. Wms. 559; *Beeler v. Young*, *Walker v. Simpson*, *supra*; *Best v. Manning*, 10 Vt. 230; and, at law, money *paid* at the infant's request for necessities, may be recovered under a count for money paid: *Randall v. Sweet*, 1 Den. 460; *Conn v. Coburn*, 7 N. H. 368; or, it was held, in *Smith v. Oliphant*, 2 Sand. 306, under a count for money lent and advanced.

But although a recovery may not be had upon a note given by an infant for necessities, yet the mere fact of the note having been given, will not of course preclude the plaintiff from recovering the value of the necessities which formed its consideration: *Earle v. Reed*, 10 Metc. 387; *McCrillis v. Howe*, 3 N. H. 348; *M'Minn v. Richmonds*, 6 Yerg. 9.

The first of these cases, however, went somewhat further. The plaintiff's declaration contained a count on a promissory note given by an infant, and an account for goods sold and delivered. The plaintiff gave the note in evidence,

Again, he cannot bind himself by stating an account; although the items of the account be all recoverable against him as for necessaries (x). Indeed, in many instances, the statement of an account often requires so very large a share of that kind of knowledge which is derived from actual experience alone, that there are perhaps few transactions for which the young commonly are less prepared; he cannot bind himself, therefore, by stating an account. For a similar reason an infant is not bound by an agreement to refer a dispute to arbitration (y), nor can he render himself liable by borrow-

(x) *Trueman v. Hurst*, 1 T. R. 40; *Ingledew v. Douglas*, 2 Stark. (3 E. C. L. R.) 36; *Oliver v. Woodroffe*, 4 M. & W. 650; *Williams v. Moor*, 11 M. & W. 256. See *London and N. Western Ry. Co. v. M'Michael*, and *Birkenhead ditto v. Pilcher*, 20 L. J. (Ex.) 97; 5 Ex. 114.

(y) *Watson on Awards*, c. 3, s. 1.

and proved the sale, delivery, and value of the necessaries which formed its consideration. The remedy on the original contract was, however, barred by the Statute of Limitations, but a local statute in Massachusetts prevents, to some extent, the bar of the limitation act, in cases of notes attested by a witness and sued by the original payee, which was the case in this instance. Under these circumstances, it was contended on behalf of the defendant, that he was not originally liable on the note, under the principles just stated,—that never having ratified it, it was voidable, and useless therefore in that action for any purpose,—and that the plaintiff, when thrown back to the consideration of the note, could not recover by reason of the lapse of time. The Court, however, held that, as a general principle, there was nothing to prevent an infant's liability on an express, as well as on an implied contract for necessaries, provided the consideration were always left open for proof as to reasonableness of amount, &c., and the Court saw no reason why the statute referred to, should not apply to the case of a note given by a minor, as well as in the case of an adult. The previous case of *Stone v. Dennison*, 13 Pick. 1, had also taken the ground that an infant could be liable on a special contract for necessaries, in every case where the consideration was thus subject to proof, and it was thus said that a contrary rule might subject the infant to hardship in cases where, by the terms of the contract, the price of the necessaries was less than could be recovered on a *quantum valebat*. It has, however, been observed of the first of these cases (by Mr. Wallace, in the note to *Tucker v. Moreland*, *supra*), that it is "inconsistent with principle, as, in a count on a special and express contract, all or none should be recovered;" and it may be remarked of the reason given in *Stone v. Dennison*, that the general rules of law as to infants are made for their protection, and lose their application when their reason ceases: *Jefford's Adm. v. Ringgold*, 6 Ala. 584.—R.

ing, even to lay out upon necessities the money borrowed (z).

In *Oliver v. Woodroffe*, just cited (a), the infant had given a *cognovit* (which, as you are no doubt aware, is an acknowledgment by a defendant that an action [*322] brought against him is rightly brought, *and that a named sum is due to the plaintiff), and it was admitted that it was given for necessities supplied to the infant. It was argued, that as an action might have been brought against him for the necessities, he ought to be allowed to confess that action, in order to save further expense. But the Court of Exchequer, after considering the point, held that the *cognovit* could not be enforced against the infant, because by that means a minor would be made to state an account, which the law will not allow him to do, so as to bind himself. If an action be brought against him, it is for the jury to determine the reasonableness of the demand. Again, the general principle being that an infant shall be bound by no contract which is not beneficial to him (b), it is held that he can engage in none in which the performance of the contract is secured by a penalty; for that it cannot be for his advantage to become subject to a penalty; and, therefore, though the old books lay it down that he may bind himself by a deed to pay for necessities (c), yet it is clearly settled that he cannot do so by a bond containing a penalty (d). A variety

(z) *Earle v. Peale*, 1 Salk. 386; *Probart v. Knouth*, 2 Esp. 472, note. But see as to the rule of Equity in such case, *Marlow v. Pitfield*, 1 P. Wms. 558.

(a) Note (x).

(b) See *Stikeman v. Dawson*, 16 L. J. (Ch.) 205; and for instances of contracts for work and wages held void as containing stipulations not for the benefit of the infant, see *R. v. Lord*, 12 Q. B. 757; 17 L. J. (M. C.) 181; *Meakin v. Morris*, 12 Q. B. D. 852; 53 L. J. (M. C.) 72.

(c) Com. Dig. Infant, B. 5.

(d) *Ayliff v. Archdale*, Cro. Eliz. 92) *Corpe v. Overton*, 10 Bing. (25 E. C. L. R.) 252.

of other examples might be given; but I think
 *what I have said sufficient to explain the gen- [*323]
 eral nature of an infant's liability and exemption from
 liability.

This rule that an infant shall not be allowed to bind himself by contracts made in trade, although, looking at it with regard to the present state of education and society, it may appear not to be so requisite as once it was, yet looking at it upon general principles, it is capable of being defended by some strong arguments. The consequences of failure in trade are so fatal, not merely to the property, but often to the reputation of the unsuccessful trader—and a failing trader is so often, in his struggles to save himself from utter shipwreck, and to keep up a good appearance in the sight of the world, induced to have recourse to disingenuous and reprehensible expedients—that possibly, upon reflection, it may be thought not unwise to guard young persons up to a certain point against the accidents and temptations of mercantile speculation, and to insure to them, as far as possible, the advantage of starting fair in life with fortunes unimpaired and characters unblemished. How grievous would be the situation of a young person beginning life at one-and-twenty an undischarged bankrupt. Against such a chance, the law, as it now stands, effectually guards him; for, as an infant cannot make himself liable on trade contracts, so he *cannot
 be adjudicated a bankrupt for a trade debt (e). [*324]

(e) *Ex parte Jones, In re Jones*, 18 Ch. Div. 109; 50 L. J. (Ch.) 673; *R. v. Wilson*, 5 Q. B. D. 28; 49 L. J. (M. C.) 13; *Belton v. Hodges*, 9 Bing. (23 E. C. L. R.) 365. Where, however, there has been an express representation by an infant carrying on a trade, that he was of full age, the person to whom such representation has been made and who has been deceived by it into giving the infant credit, may prove for the loss which he has sustained under an adjudication of bankruptcy made against the trader after he has attained full age. *Ex parte Unity Banking Association*, 3 De G. & J. 63; 27 L. J. (Bkpty.) 33; *Ex parte Jones, In re Jones*, *supra*.

Now, therefore, the general rule being that an infant cannot bind himself except for necessities, next comes the question—Suppose he do, in fact, enter into a contract for something not falling under that denomination, what will be the consequence? The answer to this is, *now*, that no action can be maintained against him during his infancy upon any such contract, nor afterwards, not even although by fraudulently representing himself to be of age he induced the plaintiff to contract with him (*f*). But formerly there was this to be added, that the contract was not absolutely *void*, but *voidable*; and therefore, when he arrived at the age of twenty-one, he might confirm it, and, if he did so, he would become liable to an action upon it (*g*).¹

[I will exemplify this by the case of *Goode v. Har-*

(*f*) *Bartlett v. Wells*, 31 L. J. (Q. B.) 57; *De Roo v. Foster*, 12 C. B. N. S. (104 E. C. L. R.) 272.

(*g*) *Goode v. Harrison*, 5 B. & Ald. (7 E. C. L. R.) 147; *Ex parte Unity Banking Ass.*, *supra*.

¹ A defendant is not estopped from setting up infancy as a defence to an action on a contract, by his fraudulent representation that he was of full age: *Merriam v. Cunningham*, 11 Cush. 40. But see *Prouty v. Edgar*, 6 Iowa, 353; *Kemp v. Cook*, 18 Md. 130.

As to contracts of infants being only voidable and not void, see *Strain v. Wright*, 7 Ga. 568; *Slocum v. Hooker*, 13 Barb. 536; *Levering v. Heighe*, 2 Md. Ch. 81; *West v. Penny*, 16 Ala. 186; *Ridgeley v. Crandall*, 4 Md. 435; *Cummings v. Powell*, 8 Tex. 80; *Ferguson v. Bell*, 17 Mo. 347. The deed of an infant is voidable—not void. It is good, therefore, until disaffirmance: *Van Nostrand v. Wright*, Hill & Den. 260; *Voorhies v. Voorhies*, 24 Barb. 150; *Pitcher v. Laycock*, 7 Ind. 398; *Peterson v. Laik*, 24 Mo. 541; *Babcock v. Doe*, 8 Ind. 110; *Palmer v. Miller*, 25 Barb. 399; *Wellborn v. Rogers*, 24 Ga. 558; *Stuart v. Baker*, 17 Tex. 417; *Griffith v. Schwendeman*, 27 Mo. 412; *Mustard v. Wohlford*, 15 Gratt. 329; *Johnson v. Rockwell*, 12 Ind. 76; *Magee v. Welsh*, 18 Cal. 155; *Blankenship v. Stout*, 25 Ill. 132; *Jenkins v. Jenkins*, 12 Iowa, 195; *State v. Plaisted*, 43 N. H. 413. An infant's voidable deed may be ratified not only by express affirmance, but by omission to disaffirm within a reasonable time: *Hastings v. Dollarhide*, 24 Cal. 195. Also by any deliberate act by which he takes benefit under it, or recognizes its validity after he comes of age: *McCormic v. Leggett*, 8 Jones, 425.—s.

rison (i).¹ A person of the name of Goode entered into a trading partnership with an infant under the age of twenty-one, named Bennion ; a third person, named Harrison, supplied them with goods, and after Bennion came of age, he took no step to signify to the world that he disclaimed the connection with Goode, but, on the contrary, allowed it to be supposed that he was still in partnership with him. After this, Harrison supplied Goode with more articles, and brought an action against him for the price, jointly with Bennion, as a co-defendant. Bennion set up his infancy, and urged that, as an infant cannot bind himself by a contract made in the course of trade, his agreement, while under age, to become Goode's partner, was not binding upon him, and consequently, that not being Goode's partner, he was not liable for the articles supplied to him. On the other hand, it was urged that, admitting the partnership contracted while he was an infant to be voidable, it was nevertheless in his option, when he arrived at his full age of one-and-twenty, to adopt and confirm it ; that by his conduct he had done so ; and that consequently he was liable for the goods supplied afterwards. The question was argued, as you may suppose, with great ability, the counsel being Mr. Baron Parke and the late Mr. Justice Littledale. The Court decided in favour of the plaintiff. The principle is clearly and strictly laid down in the judgment of Mr. Justice Bayley :—"It is clear," says his Lordship, "that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy ; but still

(i) 5 B. & Ald. (7 E. C. L. R.) 147 ; *Unity Banking Ass. v. King*, *supra*.

¹ The portion of the text included within brackets is from the sixth English edition of the work. Though now obsolete in England (*infra* *325) it has been deemed proper to insert it, together with the valuable notes of Mr. Rawle and Judge Sharswood, as still applicable in this country.

he may be a partner. If he is in point of fact a partner during his infancy, he may, when he comes of age, elect whether he will continue that partnership or not. If he continue the partnership, he will then be liable as a partner.¹ If he dissolve the partnership, and if when of age he take the proper means to let the world know that the partnership is dissolved, then he will cease to be a partner."

It is easy to apply this mode of reasoning to any other sort of contract (ii). Thus, if he makes a lease of his land, which is binding if for his benefit, but not otherwise, and after majority accepts rent, and by other acts affirms the contract, this is strong evidence that the lease is beneficial and binding (iii); or if an infant lessee remains in possession of the house or land demised, and pays rent after majority, he cannot repudiate it afterwards, but it is confirmed from the beginning (iv). This head of law has been much and elaborately considered in several recent cases, in which the liability of an infant holder of railway shares to pay the calls upon them has been in dispute. The arguments and judgments in these cases (which are cited

(ii) *Southerton v. Whitelock*, 1 Str. 690.

(iii) *Shep. Touch.* 268; *Ashfield v. Ashfield*, Sir W. Jones, 157.

(iv) *Ketsey's case*, Cro. Jac. 320; *Holmes v. Blogg*, 8 Taunt. (4 E. C. L. R.) 35. See *ex parte Taylor*, *in re Burrows*, 25 L. J. (Bkptcy.) 35.

¹ A question may here arise as to the extent of the liability for the previous debts of the firm, and in *Miller v. Sims*, 2 Hill (S. C.) 479, it was held that inasmuch as in general one partner could bind the firm by contracts made without the knowledge of the other, to say that one may enter into or affirm a partnership without incurring these liabilities, would be to say that one may affirm a contract of partnership and disaffirm that which is inseparably incident to it, and the defendant, who had, by his acts of receiving partnership funds, &c., affirmed a partnership, begun while he was yet an infant, was therefore held liable on a note given by the other partner, before such affirmation, of which he had no knowledge, and which he refused to pay when informed of it. A decision, apparently to the contrary, in *Crabtree v. May*, 1 B. Mon. 289, will, on examination, be found to have turned on the insufficiency of the replication.—R.

below) demand a very careful perusal, and will amply repay it in the very full view which they give of the principle now under discussion, and the application of it. Assuming, according to the opinion of the Court of Exchequer, that the question of the infant's liability does not depend conjointly upon the Act creating the company, and upon the Companies Clauses Consolidation Act, 8 & 9 Vict., c. 16, but upon the Common Law, it has been repeatedly decided, that, where an infant becomes the holder of shares by his own contract and subscription, he is *primâ facie* liable to pay the calls (v); he may repudiate that contract and subscription, and if he does so while an infant, although he may on arriving at full age affirm his repudiation, or receive the profits, it is for those who insist upon his liability to make out these facts (vi). Infants having become shareholders in railway companies, have been held liable to pay calls. "They are purchasers," said the Court of Exchequer in the *London and North Western Railway Company v. M'Michael*, "who have acquired an interest not in a mere chattel, but in a subject of a permanent nature, either by contract with the Company, or by devolution from those who have so contracted, and with an obligation attached to it which they are bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby become liable to all the obligations attached to the estate; for instance, to pay rent in case of a lease rendering rent, or to pay a fine due on an admission in the case of copyhold, to which an infant has been admitted (vii), unless they have

(v) *London and North Western Ry. Co. v. M'Michael*, 20 L. J. (Ex.) 97; 5 Ex. 114. See *Cork and Bandon Ry. Co. v. Cazenove*, 10 Q. B. (59 E. C. L. R.) 935.

(vi) *Newry and Enniskillen Ry. Co. v. Coombe*, 3 Ex. 565.

(vii) *Evelyn v. Chichester*, 3 Burr. 1717.

elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is equally competent for an infant so to do." Thus, where there has been no waiver or repudiation, the infant continues liable to pay the calls; and where the infant avoids the contract for purchase during minority, he is not liable. If, after full age, the party repudiates a contract made during his infancy, it may be gathered from what has been said, and indeed hardly requires stating, that he must do so within a reasonable time after he comes of age (viii). However, in order to prevent persons from inconsiderately confirming contracts made by them during infancy, and to obviate the danger of attempts to foist such confirmation on them by false evidence, it is enacted, as we have already seen (ix), by 9 Geo. IV., c. 14, s. 5, that no action shall be maintained whereby to charge any person upon any promise made, after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made, by some *writing*, signed by the party to be charged therewith.¹]

(viii) *Dublin and Wicklow Ry. Co. v. Black*, 22 L. J. (Ex.) 94; 8 Ex. 181, s. c.

(ix) See *ante*, p. *152.

¹ It has been seen in a former part of these Lectures, that any acknowledgment, not inconsistent with a promise to pay, such as a partial payment, will be sufficient to remove the bar of the Statute of Limitations. It is not so, however, with respect to the ratification of contracts made during infancy. There must either be a direct affirmation (as in the case cited, *supra*, by continuing the business, or, in the case of a chattel, by retention of the possession, selling it again, or the like: see *Lawson v. Lovejoy*, 8 Me. 405; *Aldrich v. Grimes*, 10 N. H. 194; *Kline v. Beebe*, 6 Conn. 494; *Boyden v. Boyden*, 9 Metc. 519; *Thomasson v. Boyd*, 13 Ala. 419; *Meriweather v. Herran*, 8 B. Mon. 162); or an express promise to pay, made voluntarily, with full knowledge of the liability thus incurred, made to the party himself or his agent,

*Recently, however, the law as to the void-ability and confirmation or ratification of con- [*325] tracts made by infants has been considerably altered by the "Infants Relief Act, 1874" (37 & 38 Vict., c. 62), which was passed on the 7th Aug., 1874. The 1st and 2nd sections of that Act are as follows:

- "(1.) All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.
- "(2.) No action shall be brought whereby to charge any person upon any promise made after full age

and not to a mere stranger having no interest: *Hinely v. Margaritz*, 3 Pa. St. 428; *Ford v. Phillips*, 1 Pick. 202; *Peirce v. Tobey*, 5 Metc. 168; *Hale v. Gerrish*, 8 N. H. 374; *Millard v. Hewlett*, 19 Wend. 301; *Wilcox v. Roath*, 12 Conn. 551; a mere acknowledgment or partial payment will not suffice: *Goodsell v. Myers*, 3 Wend. 481; *Robbins v. Eaton*, 10 N. H. 561; *Hinely v. Margaritz*, *supra*; for the law will imply no promise in the case of an infant, as has been seen, except for necessities.—R.

The special contract of a minor is ratified by his continuance in it for a month after his majority, and cannot afterwards be avoided: *Forsyth v. Hastings*, 27 Vt. 646; *New Hampshire Ins. Co. v. Noyes*, 32 N. H. 345; *Hodges v. Hunt*, 22 Barb. 150; *Little v. Duncan*, 9 Rich. 55; *Baxter v. Bush*, 29 Vt. 465; *Hartman v. Kendall*, 4 Ind. 403; *Emmons v. Murray*, 16 N. H. 385. A voidable contract of an infant cannot, after his coming of age, be ratified by a mere acknowledgment of the debt, but a direct promise to pay or a direct confirmation will be evidence of such ratification: *Conklin v. Ogborn*, 7 Ind. 553; *Reed v. Boshears*, 4 Sneed, 118; *Chandler v. Glover*, 32 Pa. St. 509; *Mayer v. McLure*, 36 Miss. 389; *Vaughan v. Parr*, 20 Ark. 600; *Proctor v. Sears*, 4 Allen, 95.

As to what will amount to ratification: *West v. Penny*, 16 Ala. 186; *Levering v. Heighe*, 2 Md. Ch. 81; *Williams v. Mabee*, 5 N. J. Eq. 500; *Miles v. Lingerian*, 24 Ind. 385; *Petty v. Roberts*, 7 Bush, 410; *Highley v. Barron*, 49 Mo. 103; *Baker v. Kennett*, 54 Ib. 82.—s.

to pay any debt contracted during infancy, or upon any ratification made after full age of any promise [*326] or contract (*h*) *made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age" (*i*).

It will be observed on looking at the above Act, that, although the 1st section only makes certain specified contracts *void*, and that therefore there are still some contracts left which are *voidable*, yet inasmuch as the 2nd section prevents any action being brought upon any ratification made after full age of any promise or contract made during infancy, such voidable contracts cannot form the subject of any action against the infant when he has attained full age. For if *voidable* they must be ratified to make them valid, and the ratification is now worthless; therefore as far as the infant's liability is concerned, there seems no practical distinction between *void* and *voidable* contracts. We shall see, however, that there may be a very important distinction between them, in considering the liability of the party with whom the infant contracts.

Now, then, such being the effect of an infant's contracts with regard to the infant himself, it remains only to say a word or two as to the effect of those which are

[*327] still voidable on the other *contracting party. And, as to him, the rule is (*j*), that *he is bound*

(*h*) The words "any promise or contract" in this section include a promise of marriage, and therefore a ratification of such a promise after majority affords no longer a ground of action on breach of the promise (*Coxhead v. Mullis*, 3 C. P. D. 439; 47 L. J. (Q. B., etc.) 761). There may, however, be a fresh promise made after full age, which will be binding (*Ditchman v. Worrall*, 5 C. P. D. 410; 49 L. J. (Q. B., etc.) 688); and whether what has taken place subsequently to the coming of age amounts to a ratification or a fresh promise, is a question for the jury (*Northcote v. Doughty*, 4 C. P. D. 385; *Ditcham v. Worrall*, *supra*).

(*i*) We have already seen (*ante*, p. *152) that under this section a ratification made after the Act of a contract made in infancy before the Act is void.

(*j*) This seems unaltered by the Act in respect of those contracts which it

though the infant is not; for, to use the words in which the rule is stated, in Bacon's Ab., "Infancy," I. 4,— "Infancy is a personal privilege of which no one can take advantage but the infant himself; and, therefore, though the contract of the infant be voidable, yet it shall bind the person of full age; for, being an indulgence which the law allows infants, to secure them from the fraud and imposition of others, it can only be intended for their benefit, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security. And, were it otherwise, this privilege, instead of being an advantage to the infant, would in many cases turn greatly to his detriment."¹ Thus, for instance, in *Holt v. Ward* (*k*), a gentleman of full age had promised to marry a minor. It was decided that she might maintain an action against him for breach of promise, though he could not have done so had she refused to perform her side of the contract.² Again (*l*), an infant was allowed *to maintain an action on a contract to purchase a [*328]

still leaves *voidable*. Those which it makes *void* are of course a nullity from the beginning, but there seems nothing in the Act to alter the infant's privileges, or the liability of the other party in respect of those contracts which are still *voidable*.

(*k*) 2 Str. 937.

(*l*) *Warwick v. Bruce*, 2 M. & Sel. 205; but *quære* as to his being able to do so, since the Infant's Relief Act, in this particular case, the contract being for goods supplied or to be supplied, other than necessities.

¹ Infancy is a personal privilege, and cannot be set up by third persons to avoid the contracts of the infant: *Alsworth v. Cordtz*, 31 Miss. 32; *Wilson v. Porter*, 13 La. An. 407; *Jones v. Butler*, 30 Barb. 641. The contract of an infant may be avoided by those only, besides himself, who are privy in blood or estate: *Nelson v. Eaton*, 1 Red. 498.—s.

² The case was four times argued: see the report in *Fitzgib.* 175, 275, and the decision was recognized by Lord Hardwicke, in *Harvey v. Ashley*, 3 Atk. 610, and on this side of the Atlantic, the decisions in *Hunt v. Peake*, 5 Cow. 475; *Willard v. Stone*, 7 Ib. 22, and *Cannon v. Alsbury*, 1 Marsh. 76, were based on its authority.—R.

growing crop of potatoes, on which no action could have been maintained against him.¹

I now come to the second class of persons on whose capacity to contract I think it necessary to observe. I mean that of *married women*. But their capacity in this respect has been so much affected by recent Acts of Parliament that it will be necessary to consider first the state of the Common Law upon the subject, and then the successive alterations engrafted on that law by the Acts referred to.

¹ But liberal as is the law towards infants, it does not allow them to retain possession of property, and still repudiate the contract by which that possession has been obtained; and as by the avoidance of the contract the property reverts in the vendor, the latter may bring trover, replevin, or detinue: *Mills v. Graham*, 4 B. & P. 140; *Badger v. Phinney*, 15 Mass. 359; *Boyden v. Royden*, 9 Metc. 519; *Jefford v. Ringgold*, 6 Ala. 544. And so with respect to real estate; he cannot disaffirm securities given for the purchase-money, and still claim the land under his deed: *Weed v. Beebe*, 21 Vt. 495. If, however, the goods have been wasted, sold or otherwise disposed of by the infant after the coming of age, these acts, as we have seen, amount to an affirmation of the contract, and he will then, the bar of infancy being thus removed, be liable upon the contract; but if the goods have been wasted or sold during infancy, neither trover nor detinue will lie, for a refusal after age to deliver, when he has not the goods, is no conversion: *Fitts v. Hall*, 9 N. H. 441; *Boody v. McKenney*, 23 Me. 517; and detinue does not lie where the goods have been parted with in a manner authorized by law: *Pool v. Adkisson*, 1 Dana, 110.

Upon the subject of an infant's liability for torts, the manner in which he is made a party to an action, and many other important branches of this subject, the student is again referred to the note to *Tucker v. Moreland*, 1 Am. L. C.—R.

An infant cannot rescind a contract, and bring an action to recover the value of the property parted with, without restoring to the other party the value with which he parted: *Bailey v. Barnberger*, 11 B. Mon. 113; *Womack v. Womack*, 8 Tex. 397. In a suit by an infant for the consideration of a contract avoided by him he must show a return of the property sold to him, if it remains in his possession. But its entire consumption or great deterioration by him is no defence to the action: *Price v. Furman*, 27 Vt. 268; *Manning v. Johnson*, 26 Ala. 446; *Craighead v. Wells*, 21 Mo. 404; *Burns v. Hill*, 19 Ga. 22; *Aldrich v. Abrahams*, Hill & Den. 423; *Tipton v. Tipton*, 3 Jones, 552; *Pitcher v. Laycock*, 7 Ind. 398; *Wilhelm v. Hardman*, 13 Md. 140; *Kilgore v. Jordan*, 17 Tex. 341; *Mustard v. Wohlford*, 15 Gratt. 329; *Locke v. Smith*, 41 N. H. 346; *Pursley v. Hays*, 17 Iowa, 311.—s.

Now a contract by or with a married woman is one of two sorts: it is either a contract which she entered into *before* her marriage, and which continued in existence afterwards; or it is a contract which she entered into subsequently to her marriage.

Now, with regard to the former description of contracts, by the Common Law,¹ unqualified by the provisions of recent legislation, upon the marriage, the benefit of, and the liability to, the wife's contracts made before marriage, vest in the husband, and continue vested in him during the continuance of the marriage (*m*). If she die before they are enforced, and he survive her, he is entitled to *the benefit of such contracts, not in his own right, but as her administra- [*329] tor (*n*),² and is liable to be sued on them, not in his individual capacity, but as his wife's administrator. Thus, in an action on a promissory note, brought by the administrator of Ann Hart, it was proved that it was made by the defendant and delivered by him to Ann Hart, who was then a *feme sole*, but who afterwards married William Hart (not her administra-

(*m*) *Mitchinson v. Hewson*, 7 T. R. 348; Com. Dig. tit. "Baron and Feme," E. 3. See *Milner v. Milnes*, 3 T. R. 627; Sel. N. P. 243, 13th ed.

(*n*) *Betts v. Kimpton*, 2 B. & Ad. (22 E. C. L. R.) 273.

¹ The reader will note, perhaps with surprise, that no reference is made in the succeeding pages to American statutes affecting married women. But these have become so numerous during the last thirty-five years, and vary so greatly in the different States, that it does not appear practicable to reduce them to anything like order or to make an epitome of them which will be at all complete and accurate, within the limits necessarily prescribed in this work.

² *Collins v. Hoxie*, 9 Paige, 81; *Hunter v. Hallett*, 1 Edw. Ch. 388; *Coleman v. Waples*, 1 Harring. 196. So that if the husband die without having taken out letters of administration, his administrator cannot recover her choses in action, but administration must be taken out to the wife: *Betts v. Kimpton*, 2 B. & Ad. (22 E. C. L. R.) 273; *Squib v. Wyn*, 1 P. Wms. 378; *Stewart v. Stewart*, 7 Johns. Ch. 229. If, however, the husband has taken out letters of administration to his wife's estate, and die before its full administration, his representative is, in the absence of any statutory enactment, entitled to administration *de bonis non*: *Donnington v. Mitchell*, 2 N. J. Eq. 243.—R.

tor), and died intestate in his lifetime. The Court held that the note clearly did not become the property of William Hart, but passed to the plaintiff as her administrator; and that the husband, not having obtained administration to his wife, had no interest in the note (o). If she survive him, her right to the benefit of, and her liability upon, such contract revives, assuming always that nothing has been done to put an end to the contract during the continuance of the marriage (p).¹ "With respect to debts due to the wife *dum sola*, the husband," says Lord *Ellenborough*, "is her irrevocable attorney, if I may say so: and if he reduce them into possession

(o) *Hart v. Stephens*, 6 Q. B. (51 E. C. L. R.) 937.

(p) *Rumsey v. George*, 1 M. & Sel. 176; *Fitzgerald v. Fitzgerald*, 8 C. B. (65 E. C. L. R.) 592.

¹ *Blount v. Bestland*, 5 Ves. Jr. 315; *Schuyler v. Hoyle*, 5 Johns. Ch. 196; *Hayward v. Hayward*, 20 Pick. 517; *Strong v. Smith*, 1 Metc. 476; *Weeks v. Weeks*, 5 Ired. Eq. 111, where the previous cases in North Carolina are noticed. The result briefly is, at Common Law, that for all the debts of the wife, contracted before marriage, no matter how improvident they may be, the husband is personally liable during coverture, and no longer, and this though he may not have received a cent by her; and, on the other hand, upon her death, his personal liability for her debts contracted before marriage is wholly wiped out, though he may have received a fortune by her. The apparent injustice of this latter rule, than which nothing is better settled (*Tabb v. Boyd*, 4 Call, 453; *Buckner v. Smyth*, 4 Desaus. 371; *Witherspoon v. Dubose*, 1 Bai. Eq. 166), has often been strongly urged, and equity been invoked to modify it, and Lord Nottingham is reported to have said, with some earnestness, that "he would alter the law on that point;" but in *Heard v. Stamford*, Cas. Temp. Talbot, s. c. 3 P. Wms. 411, the Chancellor said, "It is extremely clear that by law the husband is liable for the wife's debts only during the coverture, unless the creditor recovers judgment against him in the wife's lifetime, and I do not see how anything less than an act of Parliament can alter the law. If I relieve against the husband because he had sufficient assets with his wife wherewith to satisfy the demand in question, by the same reason, where a *feme* indebted *dum sola* marries, bringing no fortune to her husband, and judgment is recovered against the husband, after which the wife dies, I ought to grant relief to the husband against such judgment, which yet is not in my power, consequently there can be no ground for a court of equity to interpose in the present case; and if the law, as it now stands, be thought inconvenient, it will be a good reason for the legislature to alter it, but till that is done, what is law at present must take place." See to the same effect the remarks of Lord Redesdale in *Adair v. Shaw*, 1 Sch. & Lef. 243.—R.

during the coverture, they become his debt, but until that is done they remain the debt of the wife; and all the cases agree that in the event of his death, they would survive to her." *The Court, therefore, held [*330] that the husband alone could not be petitioning creditor upon the bankruptcy of a debtor of his wife, who became her debtor before her marriage (*q*). And the Court of Exchequer, upon the same ground of survivorship in the wife, decided that if the husband became bankrupt, his assignees could not sue in their own names alone upon a promissory note given to the wife before marriage (*r*).¹

During the marriage the husband might, as I have said, sue or be sued upon his wife's contracts, made while she was a single woman; but if he sued he must join her as a co-plaintiff; and if he were sued, she must be joined as a co-defendant (*s*).² There is one case, indeed, in which the husband may sue upon a contract made with her while single, without joining her as a co-plaintiff. This is where a bill of exchange or promissory note has been given to her; in which case his suing upon it in his own name is an election to take it to himself and a dissent to his wife's having any interest in it, an election which, as will be seen hereafter, a husband has, at Common Law, with respect to his wife's choses in action, and which the peculiar nature of a

(*q*) *Rumsey v. George*, *supra*.

(*r*) *Sherrington v. Yates*, 12 M. & W. 855; *Dingley v. Robinson*, 26 L. J. (Ex.) 55.

(*s*) *Rumsey v. George*, 1 M. & Sel. 180; *Milner v. Milnes*, 3 T. R. 627; *Pittam v. Foster*, 1 B. & C. (8 E. C. L. R.) 248.

¹ *Shay v. Sessamen*, 10 Pa. St. 432; *Eshelman v. Shuman*, 13 Pa. St. 563.—R.

² And even this although the husband make a subsequent promise; unless, of course, such promise be based upon a new consideration of benefit to himself or inconvenience to the creditor: *Waul v. Kirkman*, 13 Sm. & M. 599.—R.

promissory note enables him to make, by merely suing on it. For the wife could not, *after marriage, [*331] endorse the note, and it would be nugatory for the husband to endorse to himself. But he may, if he pleases, leave it as it is, and then the remedy on it survives to the wife (*l*).¹

Such, then, is briefly the Common Law on the subject of the wife's contracts made before marriage. We have now to consider the alterations made by the legislature. The first Act affecting the present topic is the "Married Women's Property Act, 1870" (33 & 34 Vict., c. 93), by sect. 12 of which "a husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried." By sect. 15 this Act came into operation at the time of the passing of the Act, viz., the 9th of August, 1870; and inasmuch as "an Act which comes into operation on a given day becomes a law as soon as the day commences" (*u*), the marriages affected by sect. 12 are those

(*l*) *Gaters v. Madeley*, 6 M. & W. 423. See *M'Neillage v. Holloway*, 1 B. & Ald. 218; *Howard v. Oakes*, 3 Ex. 136.

(*u*) See *per Lush, J.*, in *Tom'inson v. Bullock*, 4 Q. B. D. 230, 232; 48 L. J. (M. C.) 95, 96. See also *Wilberforce on Statutes*, Ch. IV., "The Operation of Statutes," p. 154.

¹ But this decision of Lord Ellenborough has been overruled, and it is now settled that a promissory note is, in the ordinary course of things, a chose in action, and there is nothing to take it out of the common rule that choses in action survive to the wife after the death of her husband, unless he has reduced them into possession; and it is believed to be a rule without exception that a husband can *not* sue alone to recover any chose in action belonging to the wife *before* marriage: *Fenner v. Plaskett*, Moore, 422; *Richards v. Richards*, 2 B. & Ad. (22 E. C. L. R.) 447; *Gaters v. Madeley*, 6 M. & W. 427; *Sherrington v. Yates*, 12 Ib. 855; *Hart v. Stephens*, 6 Q. B. (51 E. C. L. R.) 937; *Morse v. Earl*, 13 Weid. 271; *Clapp v. Stoughton*, 10 Pick. 470; *Johnston v. Pasteur*, C. & N. 464.—R.

which took place on or after the 9th of August, 1870, and up to the time when the *Act amending this Act, and which will be noticed immediately, came into force. The effect of this enactment is to relieve the husband, where the marriage took place during the above period, from all personal liability in respect of his wife's contracts made before the marriage. The wife, however, is made liable in respect of her separate estate, and execution can issue against her as if she were sole, and the husband need not be joined with her in the action (*x*). Under sect. 11 a married woman may now maintain an action in her own name for the recovery of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property. But this Act was amended by the "Married Women's Property Act (1870) Amendment Act, 1874" (37 & 38 Vict., c. 50), which was passed on the 30th of July, 1874; the first section of which enacts that "so much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed, so far as respects marriages which shall take place after the passing of this Act, and a husband and wife married after the passing of this Act may be jointly sued for any such debt" (*y*). The 2nd *section of the Amendment Act, however, limits the husband's liability for such debts to the extent only of his interest in his wife's property, as defined in sect. 5 of the same Act (*z*). The last-mentioned section also provides that

(*x*) *Williams v. Mercier*, 9 Q. B. D. (C. A.) 337; 51 L. J. (Q. B.) 594.

(*y*) The husband can only be sued jointly with his wife, and is not liable in a separate action after her death. *Bell v. Stocker*, 10 Q. B. D. 129, 52 L. J. (Q. B.) 49.

(*z*) Where, after the passing of the Amendment Act of 1874, an English-

when the husband after marriage pays any debt of his wife, or has a judgment *bonâ fide* recovered against him in any such action as is in that Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action (a) be liable. In the case, therefore, of marriages which have taken place on or after (b) the 30th of July, 1874, up to the time when the Married Women's Property Act, 1882, came into force, the husband is liable for the wife's ante-nuptial contracts to the extent of the property that he has got through her.

[*334] *We now come to the last and most important of all the Acts upon this subject. I mean the Married Women's Property Act, 1882 (45 & 46 Vict., c. 75), sect. 25 of which fixes the date of the commencement of the statute on (c) the 1st day of January, 1883. This Act, by its 22nd section, repeals the Married Women's Property Act, 1870, and the Amendment Act of 1874, "provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them for or in respect of any debt, contract, wrong, or other

man married in England a woman who had contracted debts while a *feme sole* in Jersey, it was held that, although by the law of Jersey a husband is liable for the ante-nuptial debts of his wife and that Act did not apply to Jersey, yet that in an action brought in England against the husband and wife for those debts, the husband was liable to the extent only of the assets derived from his wife and specified in sect. 5 of the Act. *De Greuchy v. Wills*, 4 C. P. D. 362; 48 L. J. (Q. B., etc.,) 726.

(a) The words "any subsequent action" mean any action commenced subsequently to the time of bringing the action in which judgment has been recovered, and not merely any action commenced subsequently to the recovery of the judgment: *Fear v. Castle*, 8 Q. B. D. 380, 51 L. J. (Q. B.) 279.

(b) See *ante*, p. *331.

(c) See *ante*, p. *331.

matter or thing whatsoever for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act." This, Act, therefore, only affects a wife's ante-nuptial debts and liabilities where the marriage has taken place on or after the 1st of January, 1883. With regard to such cases, sect. 13 enacts as follows:—

"A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before *or after she has [*335] been placed on the list of contributories, under and by virtue of the Acts relating to joint-stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed."

By sect. 14, "a husband shall be liable for the debts

of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which *he shall have acquired or be-
 [*336] come entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs, for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid."

Sect. 15, regulating the cases where both husband and wife may be sued for such causes of action, enacts that "a husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or
 [*337] liability against the husband alone, it is *not found that the husband is liable in respect of any property of the wife so acquired by him or to which

he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only."

The general result, therefore, of the Act is to limit the husband's liability on the wife's contracts made before the marriage to the property which he has acquired through his wife. And unless he has so acquired property she is made solely responsible, but her liability is limited to the amount of her separate estate. But the Act seems to diminish considerably the probability of the husband acquiring any property through his wife; for sect. 2 is as follows:—

"Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in *manner aforesaid (d) all real and personal property (e) [*338] which shall belong to her at the time of marriage, or shall be required by or devolve upon her after marriage, including any wages, earnings (f), money, and property gained or acquired by her in any employment,

(d) *I. e.*, to dispose of it by will or otherwise in the same manner as if she were a *feme sole*. See s. 1, sub-s. (1).

(e) By s. 24, "the word 'property' in this Act includes a thing in action."

(f) See, as to the words "wages, earnings," including the stock in trade and capital necessary for the making those wages and earnings, *Ashworth v. Outram*, 5 Ch. Div. 923; 46 L. J. (Ch.) 687.

trade, or occupation, in which she is engaged, or which she carries on separately from her husband (*g*), or by the exercise of any literary, artistic, or scientific skill."

This section, therefore, not only re-enacts sect. 1 of the Act of 1870, but entirely alters the old law as to the effect of marriage in transferring the wife's property to the husband, and unless there is a settlement, or she makes a special gift to him, he takes nothing.

It appears, therefore, from the above that the antenuptial contracts of a wife may be governed by one of four states or conditions of the law, according to the date of the marriage.

I. If the marriage took place before the 9th of August, 1870, then the Common Law still governs such contracts.

[*339] *II. If the marriage took place on or after the 9th of August, 1870, and before the 30th of July, 1874, then such contracts are regulated by the Common Law as modified by the "Married Women's Property Act, 1870."

III. If the marriage took place on or after the 30th of July, 1874, and before the 1st of January, 1883, then such contracts are regulated by the Common Law as modified by the "Married Women's Property Act, 1870," amended by the "Married Women's Property Act (1870) Amendment Act, 1874."

IV. If the marriage took place on or after the 1st of January, 1883, then such contracts are regulated by the "Married Women's Property Act, 1882," and so much of the Common Law as that Act leaves in force.

Next as to contracts entered into by a married woman

(*g*) As to what amounts to carrying on a trade separately from the husband, see *Lovell v. Newton*, 4 C. P. D. 7.

subsequently to her marriage; and here, too, the law has been so much altered by the Married Women's Property Acts of 1870 and 1882 that it will be necessary to state the law as it stood before those Acts, and then the successive alterations made by them in that law.

Now, it is the general rule of the Common Law, that a married woman cannot bind herself by any contract made during the coverture; not, as in the case of an infant, from any presumption of incapacity, but because she has no separate existence, her husband and she being, in contemplation of law, but one person. [*340] The great case on this subject is *Marshall v. Rutton* (*h*), which was decided by all the Judges in England, except Mr. J. *Buller*, and is one of the last, perhaps the very last, instance of the practice which was so common in the early ages of the law, according to which, any one of the superior Courts before which a very important point arose, requested the assistance of the Judges of the other two, to hear it discussed, and to assist in deciding it. In this case it was held that she cannot bind herself by any contract made during her coverture, although she was separated from her husband, and had a separate maintenance: nor can she where living in open adultery, although the contract was for goods sold to her, and the vendor knew not of her marriage (*i*). Her husband being a foreigner, residing abroad, is not a sufficient circumstance to make her liable (*k*); nor will his having been a bankrupt who absconded from his creditors, and was residing abroad when the contract was made, render her liable to be sued upon it (*l*).

(*h*) 8 T. R. 545; *Lewis v. Lee*, 3 B. & C. (10 E. C. L. R.) 291.

(*i*) *Meyer v. Haworth*, 8 A. & E. (35 E. C. L. R.) 467.

(*k*) *Stretton v. Busnach*, 1 Bing. N. C. (27 E. C. L. R.) 139.

(*l*) *Williamson v. Dawes*, 9 Bing. (23 E. C. L. R.) 292.

In a word, the person who contracts with a married woman, as far as any right against her personally at Common Law is concerned, relies upon her bare word ; [*341] for she is not recognised there *as a person capable of binding herself by any contract whatever,¹ save only in a few cases, which I will now specify.

The first of these is where her husband is civilly dead : for instance, where he is under sentence of transportation, or penal servitude. In such a case, to prevent her from contracting, would be to deprive her too of all civil rights ; since the husband, being civilly dead, is no longer capable of contracting for her (*m*). This is a very old doctrine, having been first established in the 2nd Hen. IV., in the Year Book of which year we find that Belknap, the Lord High Treasurer, was banished to Gascony till he should obtain the King's favour, and his wife, Lady Belknap, brought an action in the Common Pleas, which seems to have been the

(*m*) *Ex parte* Franks, 7 Bing. (20 E. C. L. R.) 762 ; *Marsh v. Hutchinson*, 2 B. & P. 226.

¹ While it is correct that a married woman cannot, by a contract made during coverture, bind *herself*, yet the *husband* may be bound by contracts made by her, in cases where it appears that she acted as his agent, or under an authority from him, express or implied.

It is well settled that a married woman cannot bind herself to answer in damages by reason of her joining with her husband in covenants in a deed conveying her estate ; but it seems not to be exactly determined whether these covenants will have any effect upon her by way of estoppel, such an effect having been recognised in some cases : *Hill's Lessee v. West*, 8 Ohio, 226 ; *Massie v. Sebastian*, 4 Bibb, 436 ; *Fowler v. Shearer*, 7 Mass. 21 ; *Nash v. Spofford*, 10 Metc. 192 ; and denied in others : *Jackson v. Vanderheyden*, 17 Johns. 167 ; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314 ; *Wadleigh v. Glines*, 6 N. H. 18 ; *Den v. Demarest*, 21 N. J. 541.—R.

The deed of a married woman is void : *Matthews v. Puffer*, 19 N. H. 448 ; *Concord v. Bellis*, 10 Cush. 276 ; *Chandler v. McKinney*, 6 Mich. 217 ; *Glyde v. Keister*, 1 Grant, 465 ; 32 Pa. St. 85. A woman after her coverture ceases cannot make a valid legal promise to pay a debt which she incurred during coverture : *Goulding v. Davidson*, 28 Barb. 438.—s.

first instance of such a proceeding by a married woman ; for it struck the lawyers of those days with so much surprise that they commemorated it by a Latin distich, which Lord Coke has thought it worth his while to preserve in the 1st Institute. It is in the old monkish style, and is not only in hexameter measure, but in rhyme also ; the words are

“ Ecce modo mirum, quod fœmina fert breve Regis,
Non nominando virum conjunctum robore legis.”

Another case is where the husband is a foreigner belonging to a country at war with Great Britain. *In such case, as he cannot lawfully contract [*342] or sue in England, it seems to be admitted that his wife may do so as if she were unmarried (*n*).¹

(*n*) *Barden v. Keverberg*, 2 M. & W. 61 ; see *De Wahl v. Braune*, 25 L. J. (Ex.) 343 ; 1 H. & N. 178.

¹ *Derry v. Duchess of Mazarine*, 1 Raym. 147. This exception, however, to the general rule which denies the efficacy of the contracts of married women, is not confined merely to the case of the wife of an *alien enemy*, nor, indeed, as it would seem by the late authorities, at least in this country, to the case of an alien at all. Some distinctions were at one time taken, which have not latterly been recognised. Thus it has been held that where the husband was a foreigner, and had never been in the country, the wife could sue and be sued on her contracts : *Walford v. Duchess of Pienne*, 2 Esp. 554 ; *De Gaillon v. L'Aigle*, 1 B. & P. 357 ; *Gregory v. Paul*, 15 Mass. 30 ; *Robinson v. Reynolds*, 1 Aik. 174 ; but not where the husband had ever resided in the country : *Kay v. Duchess of Pienne*, 3 Campb. 123 ; or was a natural born subject, though he might have deserted her and resided abroad for years : *De Gaillon v. L'Aigle*, *Boggett v. Frier*, 11 East, 301 ; *Franks v. Duchess of Pienne*, 2 Esp. 587. The distinction thus taken between an alien and a subject seems to have proceeded on the supposition that in the case of the latter, there might be an *animus revertendi*, but the later cases have judiciously neglected such a distinction, and it is now well settled, at least in this country, that where the wife has been left by her husband—has traded as a *feme sole*—and has obtained credit as such, she is liable for her debts, and on the other hand may acquire property of her own : *Rhea v. Rhenner*, 1 Pet. 105 ; *Bean v. Morgan*, 4 M'Cord, 148 ; *Starret v. Wynn*, 17 S. & R. 133 ; *Gregory v. Pierce*, 4 Metc. 478 ; *Arthur v. Broadnax*, 3 Ala. 557 ; *James v. Stewart*, 9 Ib. 855 ; and it perhaps would not be inconsistent with reason to lay down as a rule, that where the wife has obtained credit as a *feme sole*, and her husband is absent

By the custom of the city of London, a married woman is allowed to be a trader in her individual capacity, and may sue alone in the city courts on contracts made by her in the course of such trade; but it would seem that, even in this case, if she had brought an action in the Courts at Westminster, it would have been necessary to make her husband a party to it.¹ This subject is learnedly discussed in *Beard v. Webb* (o).

Even if a married woman has been divorced *a mensâ et thoro*, which before the stat. 20 & 21 Vict., c. 85, s. 7 legalised the separation of the parties, but left the marriage bond unsevered, the same rule applied. Now, however, instead of a divorce *a mensâ et thoro*, a decree for a judicial separation is pronounced in those cases in which the limited divorce before mentioned was obtainable, and has the same consequences (p); but in ad-

(o) 2 B. & P. 93.

(p) By 41 Vict., c. 19, s. 4, if a husband shall be convicted summarily or otherwise of an aggravated assault as there defined, upon his wife, the Court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband, and such order shall have the force and effect in all respects of a decree of judicial separation, on the ground of cruelty.

at the time of the contract, and until and at the time of the bringing of the suit, a recovery may be had against her. It is doubtful, however, whether the English cases to any extent abandoned the distinctions formerly taken by them, as in *Barden v. Keverberg*, cited by the lecturer, Mr. Baron Parke said that a party seeking to make a wife liable, "must make out that the husband was an alien, that he was resident abroad, and never in this country, and that the defendant represented herself as a feme sole, or that the plaintiff dealt with her believing her to be so."—R.

¹ In Pennsylvania, South Carolina, and perhaps other States, the custom of London as to feme sole traders has been imitated by statutory enactments: see *Burk v. Winkle*, 2 S. & R. 189; *Jacobs v. Featherstone*, 6 W. & S. 346; *Hobart v. Lemon*, 3 Rich. 131; *Blythwood v. Everingham*, 1b. 285.—R.

Where the wife has been a long time absolutely deserted by her husband, and left wholly to her own means of support, she is free to act as a feme sole: *Smith v. Silence*, 4 Iowa, 321. Living apart from the husband does not affect the disabilities of a feme covert: *High v. Worley*, 33 Ala. 196; and see *Prescott v. Fisher*, 22 Ill. 390; *Ayer v. Warren*, 47 Me. 217.—s.

dition *to these the wife is, while the separation continues, to be considered a *feme sole*, and [*343] may contract as such. Upon such contracts her husband is not liable; unless upon the separation alimony shall have been decreed to her, in which case, if it be not duly paid, he remains liable for necessities supplied for her use (s. 26). Moreover a wife deserted by her husband may obtain from the Court for Divorce and Matrimonial Causes, in the Metropolitan District from a Police Magistrate, or in the country from two Justices, an order to protect any property which, after her desertion, she may acquire by her own industry, or may become possessed of; and she is during the continuance of the order, and during her desertion, in the like position in regard to property and contracts, suing and being sued, as if she had obtained a decree of judicial separation (s. 21).

Now, so far with regard to a married woman's right to bind herself by contracts. But, with regard to her power of taking advantage of contracts made by other persons with her, the rule is somewhat different; for it has been decided that, if a contract be made with the wife on good consideration, during the marriage, the husband may, if he please, take advantage of it, and recover in an action on it, in which action he may join his wife as a co-plaintiff. And if he die without taking any such step, the right to sue upon it will survive to *the wife (q). One of the earliest authorities on this subject is *Brashford v. Buckingham* (r), [*344] where the wife had undertaken to cure a wound for the sum of ten pounds which the patient was ungrateful enough not to pay; and after she and her husband had recovered judgment in an action of debt, a writ of

(q) So after divorce, *Wells v. Malbon*, 31 L. J. (Ch.) 344.

(r) *Cro. Jac.* 77, confirmed in error, *Ib.* 205.

error was brought in the Exchequer Chamber on the ground that a married woman could not sue. But the Court said, that, being grounded on a promise made to the wife, upon a matter arising upon her skill, and on a performance to be made to the wife, she is the cause of the action, and so the action brought in both their names is well enough, and such action shall survive to the wife. Wherefore the judgment was affirmed. On the same principle, if a bond be made payable to her, she and her husband may sue upon it (*s*).¹ So if a promissory note be made payable to her. "Is not the wife," said Lord *Ellenborough*, "the meritorious cause of the action? She is the donee of the note, and it is acquired through her, and the note is a thing which of itself imports a consideration" (*t*). There is a very curious case of [*345] *Richards v. *Richards* (*u*), in which a married woman took a note from her own husband and two other persons. And it was held, that, though no

(*s*) *Day v. Padrone*, 2 M. & Sel. 396, n. (*b*). See *Johnson v. Lucas*, 22 L. J. (Q. B.) 174; 1 E. & B. (72 E. C. L. R.) 659; *Dalton v. Midland Counties Ry.*, 22 L. J. (C. P.) 177; 13 C. B. (76 E. C. L. R.) 474.

(*t*) *Philliskirk v. Pluckwell*, 2 M. & Sel. 395.

(*u*) 2 B. & Ad. (22 E. C. L. R.) 447.

¹ [Note by Mr. J. C. Symons.] Upon a deed *inter partes*, made during coverture, the effect of the authorities seems to be that, *primâ facie*, the right of action on the covenant belongs to the wife, and would survive to her on the death of the husband, without his having reduced it into possession, by dissenting from her right in some operative way, as by taking a new security so as to vest the interest in himself. Therefore, the coverture of the plaintiff in such a case cannot be pleaded in bar, and in an action brought by the plaintiff, the non-joinder of the husband can be pleaded only in abatement: *Bendix v. Wakeman*, 12 M. & W. 97.¹

¹ Coverture may be pleaded in abatement or in bar, according to circumstances; where the defence goes to the root of the demand, as, for instance, in an action on a bond given by the wife, it may be pleaded in bar: *Steer v. Steer*, 14 S. & R. 379; but where the defence is merely the disability of the wife to sue in her own name, it must be pleaded in abatement: *Perry v. Boileau*, 10 S. & R. 208; *Lyman v. Albee*, 7 Vt. 508.—s.

one could have sued on it in his lifetime, yet, that, after his death, she might sue the two surviving makers; and that decision is approved of in *Gaters v. Madeley* (x). In that case a promissory note was given to a married woman during the coverture. She survived her husband, and having afterwards herself died before the note was paid, it was held that her executor was entitled to maintain an action upon it. The rule was very clearly laid down in the judgment of Baron *Parke*. "This," said his Lordship, "is an action on a promissory note—an instrument on which no one can sue unless he was originally party to it, or has become entitled to it under one who was. A promissory note is not a personal chattel in possession, but is a chose in action of a peculiar nature. It has, indeed, been made by statute assignable and transferable according to the custom of merchants, like a bill of exchange. Still it is a chose in action, and nothing more. When a chose in action, such as a bond or note, is given to a *feme covert*, the husband may elect to let his wife have the benefit of it;¹ or, if he

(x) 6 M. & W. 423. See *Bendix v. Wakeman*, 12 M. & W. 97; *Guyard v. Sutton*, 3 C. B. (54 E. C. L. R.) 153.

¹ There is a familiar class of cases in equity in which the husband has suffered the wife, after marriage, to acquire a separate property of her own, as where, in *Slanning v. Style*, 3 P. Wms. 338, a husband permitted his wife to make a profit of all the butter, eggs, and poultry, beyond what was used in the family, and borrowed of her £100, the fruit of these savings, she was held entitled to come in as a creditor upon his estate, after his death; so, in *Fettiplace v. Gorges*, 1 Ves. Jr. 46; *Walter v. Hodge*, 2 Swans. 103; *Rogers v. Fales*, 5 Pa. St. 157.

In a very recent case in the Exchequer, *Messenger v. Clarke*, 5 Exch. 388, a wife who lived apart from her husband, purchased stock in her maiden name, out of the allowance made to her by him, and having sold out this stock, and given the proceeds to her brother as a gift, the husband was held entitled to recover it from him after her death, the Court holding, that although her allowance was not subject to recall by her husband, yet that the stock when purchased, became his, and that she had no authority to dispose of it as a gift. It was said, however, that if it had been parted with for a

[*346] thinks proper, he may take it himself: and if *in this case the husband had in his lifetime brought an action upon this note in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is; and in that case the remedy on it survives to the wife:¹ or he may adopt another course, and join her name with his own; and in that case, if he should die after judgment, the wife would be entitled to the benefit of the note, as the judgment would survive to her."

Here, you see, all the possible cases are put, and the consequence of each pointed out, which makes this judgment a very useful one for the purpose of practical reference.

Though it is settled law that a promissory note given to the wife during coverture is a chose in action, and not a personal chattel vested in the husband, and that upon his death the right to sue on it survives to the widow unless the husband has reduced it into posses-

valuable consideration, or the money been applied in payment of debt, it would have been otherwise. It is well settled with respect to the husband's right of disposition over his wife's choses in action, he cannot *give* them away: *Burnett v. Kinnaston*, 2 Vern. 401; *Jewson v. Moulson*, 2 Atk. 417; *Mitford v. Mitford*, 9 Ves. Jr. 87; *Johnson v. Johnson*, 1 J. & W. 456; *Hartman v. Dowdel*, 1 Rawle, 279; *Parsons v. Parsons*, 9 N. H. 309; whatever may be his power of barring her right of survivorship by an assignment or mortgage for a valuable consideration, or an application of them in discharge of a debt. See *Ryland v. Smith*, 1 Myl. & Cr. 53.—R.

¹ It has however been held in Massachusetts, that a note given or endorsed to a wife during coverture, is to be considered as actually reduced into possession, and at the husband's death would therefore go to his representative, to the exclusion of the wife's survivorship: *Shuttlesworth v. Noyes*, 8 Mass. 229; *Com. v. Marley*, 12 Pick. 173. He may, indeed, in such cases sue alone, and thus exercise his powers of reducing it into possession, but until he does so, or receives the money without suit, it would seem that he cannot be considered as having at all interfered with it, so as to deprive her of her survivorship.—R.

sion, it is still a point of nicety and difficulty to determine what is a reducing into possession by the husband, such as to deprive the wife of her subsequent remedy. In the case of *Hart v. Stephens* (*y*), where the administrator of a deceased widow sued on a note given her *dum sola*; the Court held that the husband of *the deceased, by receiving interest on [*347] the note during the life of the wife, had not reduced it into possession; and it seems to have been assumed that receiving money on it, or bringing an action for it, are alone sufficient reductions into possession—a doctrine apparently sanctioned by Lord *Kenyon*, C. J., in *Milner v. Milnes* (*z*), and by Lord *Hardwicke* in *Garforth v. Bradley* (*a*), who puts it on the ground of dissent to the interest remaining in the wife thereby evidenced on the part of the husband. In the still later case of *Scarpellini v. Atcheson* (*b*), a case which presents some noticeable features, the plaintiff was a widow, and the payee of a promissory note made to her during coverture by the defendant. The husband caused the wife, as the plea stated, “in his marital right,” to endorse to F., who after his death delivered it to the wife, who then brought this action upon it. The court embodied in the judgment the doctrine we have just stated, and held that the facts as stated did not amount to a reduction into possession by the husband.¹ Still more recently, in a case where the defend-

(*y*) 6 Q. B. (51 E. C. L. R.) 937.

(*z*) 3 T. R. 627.

(*a*) 2 Ves. 675; *Michelmores v. Mudge*, 29 L. J. (Ch.) 609; *Hamilton v. Mills*, 29 Beav. 193.

(*b*) 7 Q. B. (53 E. C. L. R.) 864.

¹ On the subject of reduction to possession by the husband of the wife's choses in action, see *Poor v. Hazleton*, 15 N. H. 564; *Stoner v. The Com.*, 16 Pa. St. 387; *Barron v. Barron*, 24 Vt. 375; *Abington v. Travis*, 15 Mo. 240.—s.

ant received money from a third person to be appropriated to the use of a married woman, and he wrote telling her he held the money at her disposal, and the husband survived the wife, and died, never having at [*348] any time interfered in any *way as to the money; it was held that the wife's representative and not the husband's was the proper party to sue for the money, as the facts showed a chose in action conferred on the wife with which the husband had not interfered during coverture (c).

Such then being the state of the Common Law, qualified only by the statute in cases of judicial separation or desertion, we now come to the effect of the "Married Women's Property Act, 1870" (33 & 34 Vict., c. 93), on contracts entered into by a married woman subsequently to her marriage. By sect. 1 of that Act, the wages and earnings (d) of any married woman acquired or gained by her after the passing of the Act in any employment, occupation, or trade, in which she is engaged or which she carries on separately (e) from her [*349] husband, and *also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property, held and settled to her separate use, independent of any husband

(c) *Fleet v. Perrins*, L. R. 3 Q. B. 536; 37 L. J. (Q. B.) 233; affirmed in Ex. Ch., L. R. 4 Q. B. 500; 38 L. J. (Q. B.) 257. See also *Jones v. Cuthbertson*, L. R. 7 Q. B. 218; 41 L. J. (Q. B.) 145; affirmed in Ex. Ch., L. R. 8 Q. B. 504; 42 L. J. (Q. B.) 221; *Nicholson v. Drury Buildings Building Co.*, 7 Ch. Div., 48; 47 L. J. (Ch.) 193; *Widgery v. Tepper*, 5 Ch. Div. 516, 7 Ib. 423; 46 L. J. (Ch.) 579, 47 Ib. 550; *In re Barber*, *Dardier v. Chapman*, 11 Ch. Div. 442; *Parker v. Lechmere*, 12 Ch. Div. 256.

(d) See, as to those words including the stock in trade and capital necessary for the making of those wages and earnings, *Ashworth v. Outram*, 5 Ch. Div. 923; 46 L. J. (Ch.) 687.

(e) As to what amounts to carrying on a trade separately from the husband, see *Lovell v. Newton*, 4 C. P. D. 7.

to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property. Under sect. 10 of the same Act, "a married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman." And sect. 11 enables a married woman to maintain an action in her own name for the recovery of any wages, earnings, money and property by the Act declared to be her separate property; and gives her in her own name the same remedies against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman (*f*).

*Under this Act then, all married women [350] whether married before or after the date of its coming into operation are enabled to enter into such contracts as are mentioned in the above sections, during the marriage, and thus the law stands as to the contracts of married women up to the end of the year 1882.

On the 1st of January, 1883, the "Married Women's Property Act, 1882" (45 & 46 Vict., c. 75), came into force, and now by sect. 1, sub-sect. 2, of that Act, "a married woman shall be capable of entering into and

(*f*) It has been held that a married woman might under this section maintain an action in her own name to recover damages against her bankers for dishonouring cheques drawn by her in the course of a trade which she carried on separately from her husband, or for not duly presenting or not giving due notice of dishonour of a bill of exchange acquired by her in such trade, and intrusted to them by her for presentment,—it being a remedy for the protection and security of her separate property within that section. *Summers v. City Bank*, L. R. 9 C. P. 580; 43 L. J. (C. P.) 261.

rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.” *This last [*351] Act seems to remove all disabilities as to the power of contracting which affected married women before it came into operation.

There are then three periods within which the contracts of married women made during their marriage may fall, as to each of which the law applicable varies:—

1. What we may call the Common Law period, which terminated on the 8th of August, 1870:

2. The period of partial disability, commencing with the 9th of August, 1870, and expiring with the year 1882:

3. The period of general emancipation from disability, commencing with the 1st of January, 1883.

But suppose a married women has entered into a contract and breaks it, what is the remedy?

The answer depends on whether the contract was made before or after the “Married Women’s Property Act, 1882.”

If the contract was made before that Act came into force, then the remedy is not an action against her personally (*g*), but is an action against the separate estate,

(*g*) *Attwood v. Chichester*, 3 Q. B. D. 722; 47 L. J. (Q. B., &c.) 300; *Durrant v. Ricketts*, 8 Q. B. D. 177; 51 L. J. (Q. B.) 425.

if any, which the woman had at the time of the contract. At Common Law, as I have already said (*h*), the person who contracted with a married woman, so far as any right against *her personally was concerned, relied upon her bare word. But [*352] she could, according to the rules of Equity, bind by her contracts her separate estate, if she had any. She could not indeed so bind any property which she might subsequently acquire; but so much of the separate property, which she had at the time the contract was made, as remained at the date of the judgment against her estate was made liable (*i*). But in such an action it has been held that the husband must be joined with her as a defendant. Thus in the recent case of *Hancocks v. Lablache* (*k*), the plaintiffs were jewellers, and the defendant, a married woman, was an actress and public singer, and as such engaged in an employment from which she derived wages and earnings separately from her husband, and thereby had acquired separate property within the meaning of sect. 1 of the Married Women's Property Act, 1870. The plaintiffs had sold jewellery to her, for part only of which she had paid, and, in order to *recover the balance, sued her alone, [*353] not claiming relief against her personally, but seeking to charge her separate estate. While the Court held that the right relief was sought, it held also that the husband must be joined as a defendant, although

(*h*) *Ante*, p. *340.

(*i*) *Pike v. Fitzgibbon*, 17 Ch. Div. (C. A.) 454; 50 L. J. (Ch.) 394; overruling *S. C.* 14 Ch. Div. 837; 49 L. J. (Ch.) 493; *King v. Lucas*, 23 Ch. Div. 712; 53 L. J. (Ch.) 64. See also *Chapman v. Biggs*, 11 Q. B. D. 27.

(*k*) 3 C. P. D. 197; 47 L. J. (Q. B., etc.) 514. In the recent case, however, of *Williams v. Mercier*, 9 Q. B. D. 337 (already cited), *ante*, p. *332, which was an action against a married woman sued alone for debts contracted by her before marriage it was held by the Court of Appeal, on the construction of sect. 12 of the M. W. P. Act, 1870, that it was not necessary to join the husband in an action for such debts.

the wife was living apart from him, the last mentioned Act not having altered the law as to the proper mode of suing a married woman in respect of that property which by that Act was made her separate estate.

Such, then, is the extent of the liability of married women in respect of contracts made before the Act of 1882 came into force; and it would seem, from the saving clause in sect. 22 of the last mentioned Act, already cited (*l*), that in actions on such contracts, it would be still right to join the husband, but for the New Rules of 1883, of which Order XVI., rule 16, provides that married women may be sued as provided by the Married Women's Property Act, 1882; and as this Act enables them to be sued alone, it would seem that in any such action now brought in the High Court it is unnecessary to join the husband, whether the contract was made before or after the last mentioned Act came into force.

But what is the extent of the remedy where the contract has been made since the end of the year 1882?

[*354] *In this case the married woman may be sued alone, but her liability is limited to her separate property (*m*). But, as we have already seen, the likelihood of her having separate property is greatly increased (*n*). The Rule of Equity also, which exempts the wife's after-acquired property from liability to a previous contract by her (*o*), seems abolished. For by sect. 1, sub-sect. 3, of the Act of 1882, "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown." And by sub-sect. 4, "every contract entered

(*l*) *Ante*, p. *334.

(*m*) See sect. 1, sub-sect. 2, of the Act of 1882, cited *ante*, p. *350.

(*n*) See M. W. P. Act, 1882, s. 2, *ante*, p. *337.

(*o*) See *ante*, p. *352. See as to the alteration of this rule by the M W.P. Act, 1882, *Bursill v. Tanner*, 13 Q. B. D. 691, 693.

into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." These two sub-sections have no retrospective operation so as to include contracts entered into by a married woman before the commencement of the Act (*p*).

Where also a married woman carries on a trade separately from her husband, she may be made a bankrupt, sect. 1, sub-sect. 5, of the Act, enacting that "every married woman carrying on a trade separately from her husband (*q*) shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*."

*Having thus disposed of the considerations [*355] arising on contracts made with or by infants and married women, I will postpone the conclusion of this branch of the subject till the next Lecture.

(*p*) *Conolan v. Leyland*, 27 Ch. Div. 632.

(*q*) As to what amounts to carrying on a trade separately from the husband, see *Lovell v. Newton*, 4 C. P. D. 7.

PARTIES TO CONTRACTS.—INSANE PERSONS.—INTOXICATED PERSONS.—ALIENS.—CONVICTS.—CORPORATIONS.—PUBLIC COMPANIES.—THE MODE IN WHICH COMPETENT PERSONS CONTRACT.—AGENTS.—PARTNERS.

PURSUING the inquiry upon which I entered in the last Lecture with regard to the competency of the parties to *Contracts*, and having disposed of the cases of *Infancy* and *Coverture*, the next in order is that of persons of *non-sane* mind, whose disability arises, not as in the two former cases, from a positive rule of *law*, but from the very nature of their disorder itself.

In the earliest ages of our law, the rule which common sense dictates on this subject appears to have prevailed, namely, that a person deprived of the use of that reason which is the *instrument*, if I may so say, with which men contract, shall not be bound, to his own injury, by contracts made while in such a situation.¹ Thus, in Fitzherbert's *Natura Brevium*, 202, it is laid down, that a person who had enfeoffed another of his land while *non compos* might, on recovering his intellect, avoid the feoffment. But soon afterwards a [*357] doctrine was established *of the most absurd description which it was possible for the ingenuity, even of an ancient lawyer, to have devised. It was admitted that the acts and contracts of a lunatic could not be looked upon as valid as far as they affected

¹ *Mitchell v. Kingman*, 5 Pick. 431; *Rice v. Peet*, 15 Johns. 503; *Grant v. Thompson*, 4 Conn. 203; 1 Story's Eq. Jur. § 225.—R.

other persons, but it was said that they should bind the lunatic himself, after he had recovered the use of his reason; "for," said the old lawyers, "a man cannot remember what he did when he was out of his mind, and consequently cannot recollect whether he did this or that particular act, or entered into this or that particular contract." And they actually carried this so far, that it became a maxim that *a man should not be heard to stultify himself*, and it is laid down as such in the 405th and 406th sections of Littleton, and in *Stroud v. Marshall* (a), where the opinion of Fitzherbert to the contrary, in his *Natura Brevium*, was overruled.

However, in more modern times, the common sense of the Courts began to be shocked by this doctrine, and Sir William Blackstone, in his *Commentaries* (b), argues with great force of reasoning against it. In the later cases of *Yates v. Boen* (c) and *Faulder v. Silk* (d), it seems to have been discarded; and there is no doubt now that the lunacy of one of the contracting parties may be shown by himself if sued upon a contract entered into while *he was in that condition. [*358] However, it would not be for the lunatic's own benefit to prohibit him *absolutely* from binding himself by any contract whatever. Such a prohibition might prevent him from obtaining credit for the ordinary necessities of life; and there are modern cases in which contracts evidently of a fair and reasonable description entered into with a lunatic have been held binding on him, and have been enforced. In the case of *Baxter v. Earl of Portsmouth* (e), an action was brought against the Earl of Portsmouth for the hire of several carriages. It was proved that the carriages were suit-

(a) Cro. Eliz. 398.

(d) 3 Camp. 126.

(b) 2 Bla. Com. 291.

(e) 5 B. & C. (11 E. C. L. R.) 170.

(c) Stra. 1104.

able to his rank and fortune, and that the price charged for them was a fair and reasonable one; but, on the other hand, it appeared that an inquisition had issued out of Chancery under which the Earl was found to have been insane for a period long anterior to the time at which the carriages in question were supplied to him. The *L. C. J. Abbott*, before whom the case was tried, directed the jury, that, as the articles hired were suitable to the station and fortune of the defendant, and as the plaintiffs, at the time of making the contract, had no reason to suppose him of unsound mind, and could not be charged with practising any imposition upon him, they were entitled to recover; and the jury accordingly found a verdict for the plaintiffs. Mr. (after-
[*359] wards Lord) **Brougham* moved in the next term to set it aside, but the Court supported the direction of the Lord Chief Justice.

In a subsequent case of *Brown v. Jodrell (f)*, the lunatic was the chairman of a society called the *Athenaion*, and he had concurred in ordering work and goods to be supplied to them; for these Lord *Tenterden* held that he might be sued by the person who had supplied them. From these decisions it is plain that a lunatic's contracts are binding in many instances; and some treatises suggest that he stands on the same footing with an infant, and is liable only for necessaries. But this is, I think, not quite so; nor would it be reasonable that it should be so; for, where a lunatic is permitted to go about and appear to the world as a person of sane mind, it would be very hard indeed to prevent persons who had supplied him with goods under that impression at a fair price, from recovering because the articles were not necessaries. And, in the case I

(f) *M. & M.* (22 E. C. L. R.) 105; 3 Car. & P. (14 E. C. L. R.) 30, *S. C.* See also *Dane v. Kirkwall*, 8 Car. & P. (34 E. C. L. R.) 679.

have just cited, of *Brown v. Jodrell*, an infant could not, I think, have been held liable for goods supplied to the Athenæon. A later case in which the subject has been canvassed, is that of *Tarbut v. Bispham* (g), in which one of the questions was, whether a lunatic laboured under the same incapacity to bind himself by stating an account as I have *already shown [*360] you that an infant does. The case went off upon a different point, but the Court said, that, had it become material they would have granted a rule for the purpose of considering it.

It seems clear that a lunatic is liable upon an executed contract for articles suitable to his degree, furnished by a person who did not know of his lunacy, and practised no imposition upon him.¹ Where A.

(g) 2 M. & W. 2.

¹ In the recent case of *Molton v. Camroux*, 2 Exch. 501, which was an action to recover money paid by a lunatic for the purchase of an annuity, the jury found that the transaction was a fair and business one, and made by the defendants in good faith, and in ignorance of the plaintiff's unsoundness, and the Court in giving judgment for the defendant, thus reviewed the cases:

"The plaintiff's counsel distinguished the cases of *Brown v. Jodrell*, 3 Car. & P. (14 E. C. L. R.) 30, and *Baxter v. The Earl of Portsmouth*, 2 C. & P. (12 E. C. L. R.) 178; 5 B. & C. (11 E. C. L. R.) 170, and other cases of that sort, on the ground that necessities furnished to a lunatic were an exception to the general doctrine that he could not make a contract; and he cited the judgment of the Lord Chief Baron, in the case of *Gore v. Gibson*, as showing a distinction between express and implied contracts, and deciding that all express contracts were void, if the parties to them were incapable of making a contract. On the other hand, it was argued by the defendant's counsel, that there was a distinction between contracts executed and executory; that executory contracts could not be enforced, but that executed contracts could not be disturbed, if made in good faith and without notice of the incapacity; and he called our attention to this, that all the cases cited were cases where damages for the breach of an executory contract were in question, but that no case had yet decided, that an executed contract, if perfectly fair and *bond fide*, could be questioned on the ground of the unsoundness of mind of both parties; and he cited the case of *Howard v. The Earl of Digby*, 2 Cl. & Fin. 634; *Williams v. Wentworth*, 5 Beav. 325; and *Selby v. Jackson*, 6 Beav. 192, to show

advanced money on mortgage to B., a lunatic, but did not know B.'s state, and took no advantage of him, he

that the House of Lords in the first case, and Lord Langdale in the two last, had recognized the liability of lunatics or their estate, in respect of contracts *bond fide* acted upon. The case of *Niell v. Morley*, 9 Ves. Jr. 478, before Sir William Grant, to the same effect, had been cited before, by the counsel for the plaintiff.

"As far as we are aware, this is the first case in which it has been broadly contended that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair, *bond fide*, reasonable, and without notice, on the part of those who have dealt with the lunatic.

"On looking into the cases at law, we find that, in *Brown v. Jodrell*, Lord Tenterden says, 'I think the defence (of unsoundness of mind) will not avail, unless it be shown that the plaintiff imposed on the defendant.' In *Baxter v. The Earl of Portsmouth*, 5 B. & C. (11 E. C. L. R.) 170 (the *Nisi Prius* authority of which is in 2 C. & P. (12 E. C. L. R.) 178), Abbot C. J., with the concurrence of the rest of the Court, laid down the same doctrine. In *Dane v. Viscountess Kirkwall*, Mr. Justice Patteson, in directing the jury, said, 'It is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it and took advantage of it.'

"We are not disposed to lay down so general a proposition, as that all executed contracts *bond fide* entered into must be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude, that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property, which is fair and *bond fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in *statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him. And this is the present case, for it is the purchase of an annuity which has ceased." This judgment was subsequently affirmed on error in the Exchequer Chamber, 4 Exch. 18.

The same principle was adopted in Pennsylvania, in *Beals v. See*, 10 Pa St. 60 (following *La Rue v. Gilkyson*, 4 Ib. 375), where it was held that the administrator of a lunatic could not, in the absence of fraud or knowledge of his state of mind, or such conduct on the part of the lunatic from which his disease might fairly be inferred or suspected, recover back the price of merchandise sold to him, even though it was unsuited to the object for which it was purchased, and above market price.

In Massachusetts, however, in the case of *Seaver v. Phelps*, 11 Pick. 304, which was trover for a promissory note, pledged by the plaintiff while insane, to the defendant, the Court were, on behalf of the latter, requested to charge, that although the plaintiff might have been insane at the time of making the contract, yet that if the defendant were not apprised of that fact, or had no reason, from the conduct of the plaintiff or from any other source

was held entitled to a decree of foreclosure (*h*). It seems equally clear that he is not liable when the other

(*h*) *Campbell v. Hooper*, 24 L. J. (Ch.) 644. See also *Drew v. Nunn*, 4 Q. B. D. 601; 48 L. J. (Q. B.) 591, a case cited more fully *post*, at the end of this Lecture.

to suspect it, and did not overreach or impose upon him, or practice any fraud or unfairness, the contract could not be annulled; but the Court refused so to charge, and the jury having found for the plaintiff, the Supreme Court affirmed the judgment on the authority of *Thompson v. Leach*, 3 Mod. 310, and regarded the law on the subject of contracts, made by lunatics, as being on the same footing as those of an infant; and it was said that the case of *Baxter v. The Earl of Portsmouth*, *supra*, was, notwithstanding the dicta in the case, decided mainly on the ground of the carriages being suitable to the defendant's condition in life, and the opinion of Lord Tenterden, in *Brown v. Jodrell*, *supra*, as to the materiality of the absence of imposition, was disapproved. It may be remarked, however, that *Thompson v. Leach* is not an authority for such a point, further than that, "the grants of infants, and of persons *non compos mentis*, are parallel both in law and reason," and this is a well-settled rule of the law of real estate, the grants of both being voidable: *F. N. B.* 202 n; *Mitchell v. Kingman*, 5 Pick. 431; *Allis v. Billings*, 6 Metc. 419 (see the termination of the case in 2 Cush. 19, by which it appears that the party was, at times at least, only feigning insanity): *Fitzgerald v. Reed*, 9 Sm. & M. 102. The recent case of *Hallett v. Oakes*, 1 Cush. 296, was an action to recover the value of professional services in a *habeas corpus* to procure the liberation of one who was insane and remanded as such, and a recovery was allowed on the ground of such services being classed with necessities, and having been rendered by the plaintiff in good faith, and on due inquiry into the grounds and causes of the confinement.—R.

Where a person apparently of sound mind and not known to be otherwise, fairly and *bond fide* purchases property, and receives and uses the same, payment cannot be refused either by the alleged lunatic or his representatives: *Matthiessen R. Co. v. M'Mahon*, 38 N. J. 537. As to the liability of insane persons for necessities, see *Ex parte Northington*, 1 Ala. (S. C.) 400; *Sawyer v. Lufkin*, 56 Me. 308.

See on the subject of insanity generally, *Dennett v. Dennett*, 44 N. H. 531; *Bond v. Bond*, 7 Allen, 1; *Hovey v. Chase*, 52 Me. 304; *Maddox v. Simmons*, 31 Ga. 512; *Somers v. Pumphrey*, 24 Ind. 231; *Cain v. Warford*, 33 Md. 23; *Hall v. Unger*, 2 Abb. 507; *Staples v. Wellington*, 58 Me. 453; *Boyd v. Boyd*, 66 Pa. St. 283; *Musselman v. Cravens*, 47 Ind. 1.—s.

In *Kendall v. May*, 10 Allen, 59, a wealthy lunatic was sued for board, services rendered, and expenses incurred on his behalf. Among the latter were charges for pleasure trips made by plaintiff and his wife with the lunatic at his invitation. The court said: "The judge properly refused to instruct the jury that the journey taken by the defendant out of the State was not reasonably necessary for him, and that the plaintiff could not properly take him on

contracting party has taken advantage of his lunacy: indeed, that was the decision in *Levy v. Baker*, reported in a note to *Brown v. Jodrell* (i).

The law upon the subject has also been reviewed by the Court of Exchequer in the case of *Molton v. Camroux* (k). This was an action for money had and received, brought by the administration of an intestate, to recover from an annuity society the price paid by the intestate for annuities granted by the society. The ground was, that the intestate was not of sound mind when he paid the money. The elaborate judgment delivered by *Pollock*, C. B., will amply repay an attentive perusal. "As far *as we are aware," the Court [*361] said, "this is the first case in which it has been broadly contended that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair and *bonâ fide*, reasonable, and without notice on the part of those who have dealt with the lunatic;" and the Court refused to

(i) M. & M. (22 E. C. L. R.) 106, n.

(k) 2 Ex. 487.

a journey for pleasure out of the State without the sanction of his former guardian or of the courts or of his relations. . . . The plaintiff incurred the risk of being able to satisfy the jury that the charges were reasonable and proper. The fact that the former guardian had provided rooms and necessities for the ward, was not material. . . . It appears that he is capable of enjoying, to some extent, many pleasures and luxuries, and that he has preferences as the place of his residence and his associates. Humanity and his right to his own property require that he should not be restrained or thwarted in his preferences and enjoyments more than is necessary for his own welfare." Among the later American cases see *Titcomb v. Vantyle*, 84 Ill. 371; *McCormick v. Tittler*, 85 Ib. 62; *Willemin v. Dunn*, 93 Ib. 511; *Hospital v. Fairbanks*, 129 Mass. 78; *Matthiessen R. Co. v. McMahon*, 38 N. J. 537; *Blakeley v. Blakeley*, 33 N. J. Eq. 502; *Young v. Stevens*, 48 N. H. 133; *Ins. Co. v. Hunt*, 79 N. Y. 541; *Kneedler's Appeal*, 92 Pa. St. 428; *Wirebach v. Bank*, 97 Ib. 543; *Ashcraft v. De Armand*, 44 Iowa, 229; *Burgess v. Pollock*, 53 Ib. 273; *Rusk v. Fenton*, 14 Bush, 490; *Northington, ex parte*, 37 Ala. 496; *Henry v. Fine*, 23 Ark. 417; *Henderson v. McGregor*, 30 Wis. 78; *Wilder v. Weakley*, 34 Ind. 181.

allow the money to be recovered back. The case was carried, by a writ of error into the Court of Exchequer Chamber (*l*), and that Court laid down (affirming the judgment of the Court below), that when the lunatic's state of mind was unknown to the other contracting party, and no advantage was taken of him, and the contract was not merely executory, but executed in the whole or in part, and the parties cannot be restored to their original position, the contract is not void on account of lunacy. A subsequent case of *Beavan v. M'Donnell* (*m*) differed in some degree from the one last cited. The action was brought to recover a deposit paid on a contract for the purchase of real estate, the title of which the plaintiff was to accept unless he objected within a specified time. It was admitted upon the pleadings, that at the time the plaintiff entered into the contract he was a lunatic, and *therefore [*362] incapable of contracting, or of understanding the meaning of a contract, or of managing his affairs, and that the contract was of no use or benefit to him, but that his state was unknown to the defendant. The Court said that the contract was entered into by the defendant fairly and in good faith, and without knowledge of the lunacy; and being a transaction completely executed, so far as the deposit was concerned, the defendant had done all he ought to do to make it his own. The plaintiff had had all he bargained for—the power of buying an estate, and a title established in a given time, on payment of the residue of the purchase-money. The Court thought the case came within the principle upon which *Molton v. Camroux* was decided, and that it made no difference that it was admitted that

(*l*) *Molton v. Camroux*, 4 Ex. 17; *Campbell v. Hooper*, 24 L. J. (Ch.) 644.

(*m*) 23 L. J. (Ex.) 94; 9 Ex. 309, *S. C.* See 23 L. J. (Ex.) 326; 10 Ex. 184; *Moss v. Tribe*, 3 Fost. & Finl. 9.

the plaintiff was incapable of understanding the meaning of contracts; whereas in the former case it was not necessary to be inferred that he was incapable of knowing the nature of his acts. As a lunatic is liable upon such contracts entered into by himself, so he is liable for necessities furnished to his wife (*n*), he having become lunatic since the marriage; for, by contracting the relation of marriage, a husband takes on himself the duty of supplying his wife with necessities; and if he does not perform that duty, either through his [*363] own fault or in consequence of a misfortune, such as lunacy, the wife has by reason of that relation an authority to procure them herself, and the husband is responsible for what is so supplied. But it would seem to be the better opinion that an executory contract entered into by a lunatic of non-sane mind at the time he entered into it, cannot be enforced against him; *sed quære*.¹

(*n*) *Read v. Legard*, 6 Ex. 636.

¹ In *Wirebach v. First National Bank*, 97 Pa.St. 543, *Trunkey, J.*, laid down the rule very broadly. He said, "There can be no binding executory agreement where one of the parties is bereft of reason; a capacity to contract is absolutely necessary. An insane person is incapable of committing a crime or making a contract. The question now presented," he continued, "is: Will an action lie on the accommodation endorsement of a promissory note by a lunatic? . . . The holder of a madman's note stands in no better position than the payee. An accommodation maker or endorser, in fact, is a surety for the principal debtor, and where he is an infant or an insane person, he or his representatives may defend as in other forms of contract. We are not persuaded that commercial or public interests require an adjudication that a lunatic who signs a contract as surety, or as accommodation maker or endorser, is liable for the debt of another man." See also *Beavan v. M'Donnell*, 9 Exch. 309; *Loomis v. Spencer*, 2 Paige, 158; *Skidmore v. Romaine*, 2 Bradf. (N. Y.) 122.

A person mentally incapable of entering into a contract cannot contract a valid marriage; but it must appear beyond question that the party was an absolute lunatic, and even in this case the contract is capable of ratification when the sanity of the party is restored. Fraud or coercion brought to bear upon a party of weak mind is sufficient ground for the rescission of a marriage

As the law regarding the contracts of lunatics has experienced some alteration, so also has the law regarding contracts entered into by the class of persons whom I shall next specify,—I mean persons deprived of the use of their ordinary understanding by intoxication. It has been always admitted that if one man, by contrivance and stratagem, reduced another to a state of inebriety, and induced him while in that state, to enter into a contract, it would be void upon the ordinary ground of fraud; for the liquor would be in such case an instrument used by the one party to assist him in his plot against the other (o).¹ But it has been supposed that, where the drunkenness of the contracting party was occasioned, not by the fraud of the contractee, but by his own folly, he could not in such a case set it up as a defence; since, by doing so, he would take advantage of his own wrong. You will see this view taken in Co. Litt. 247 a, and even so *late as [*364] *Cory v. Cory* (p). There are, however, several later cases, in which it seems to have been treated as erroneous. In *Pitt v. Smith* (q), issue had been joined upon the question whether there was an agreement between the plaintiff and defendant for the sale of an estate. It was proved that in fact there was an *agreement* signed, but one of the parties when he signed it was intoxicated: Lord *Ellenborough* said:—"There was no agreement between the parties, if the defendant

(o) *Gregory v. Fraser*, 3 Camp. 454; *Brandon v. Old*, 3 Car. & P. (14 E. C. L. R.) 440.

(p) 1 Ves. 19.

(q) 3 Camp. 33.

in cases where the incapacity of the party is not, of itself, sufficient to induce the court to avoid the contract: Wharton & Stille's Med. Jur., §§ 17, 18, and cases cited.

¹ *Hotchkiss v. Fortson*, 7 Yerg. 67; *Harvey v. Pecks*, 1 Munf. 518.—R.

was intoxicated in the manner supposed, when he signed this paper. He had not *an agreeing mind*. Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, or *non assumpsit* to a promise;" and he directed a nonsuit, which the full Court afterwards refused to set aside. In *Fenton v. Holloway* (r) Lord *Ellenborough* again ruled in the same manner (s).¹ And it may be considered as now

(r) 1 Stark. (2 E. C. L. R.) 126.

(s) See *Sentance v. Poole*, 3 Car. & P. (14 E. C. L. R.) 1; *Cooke v. Clayworth*, 18 Ves. 12.

¹ In *Gore v. Gibson*, 13 M. & W. 625, Pollock, C. B., referred to the conclusion drawn from the authorities by Chancellor Kent, in his Commentaries (vol. ii. p. 451), viz.: that no contract made by a person in that state, when he does not know the consequences of his acts, is binding upon him; and added, that it seemed to be in accordance with reason and justice. It is immaterial, moreover, whether the drunkenness, if carried to that extent, were voluntary, or the result of design in the other party: *Barrett v. Buxton*, 2 Aik. 167; *Wigglesworth v. Steers* 1 Hen. & Munf. 70; *Prentice v. Achorn*, 2 Paige, 30; *Cooke v. Clayworth*, 18 Ves. Jr. 15. And on the other hand, it is equally well settled, that mere intoxication, unless carried so far as to benumb the understanding, will not of itself constitute a defence to the performance of a contract, or afford a ground for its rescission if executed: *Belcher v. Belcher*, 10 Yerg. 121; *Pittenger v. Pittenger*, 3 N. J. Eq. 156; *French v. French*, 8 Ohio, 214; *Jenners v. Howard*, 6 Blackf. 240. Whether the intoxication was so complete as to destroy "the agreeing mind," is, of course, a question for the jury: *Burroughs v. Richman*, 13 N. J. 238. If, however, it were proved that advantage was taken of a person excited by drink, though not to such an extent as to impair all his reasoning faculties, it is apprehended that at law the case might be brought within the ground of fraud, although the contracting party might not have been directly incited to drink by the other; and it is well settled that equity will afford relief under such circumstances: *Reynolds v. Waller*, 1 Wash. 164; *Crane v. Conklin*, 1 N. J. Eq. 346; *Hutchinson v. Tindall*, 3 N. J. Eq. 357; *Pittenger v. Pittenger*, Ib. 156; *Conant v. Jackson*, 16 Vt. 335; *Campbell v. Spencer*, 2 Binn. 133; and so when the mind is enfeebled by habitual intoxication: *Wilson v. Bigger*, 7 W. & S. 124; *Morrison v. M'Leod*, 2 Dev. & Bat. Eq. 221. It is evident, however, that although one may, by reason of drunkenness, be incapable of contracting, yet his contract may be ratified by his retaining the subject of the contract when sober: *Gore v. Gibson*, *supra*.—R.

Drunkenness does not render a deed made under its influence absolutely void, but only voidable: so long as the grantor in the deed acquiesces in it, it cannot be impeached by third persons on the ground that it was executed by

settled, that intoxication avoids a contract when it is so complete as to prevent a man from knowing what he is about: in that state he is, in common parlance, "not himself," nor are his acts his own. Thus, in *Gore v. Gibson* (*t*), where the endorsee of a bill sued the endorser, who pleaded drunkenness at the time of the endorsement, it was held that this ^{*}was a good answer to the action. "It is just the same," [*365] said Mr. Baron *Alderson*, in that case, "as if the defendant had written his name upon the bill in his sleep, in a state of somnambulism." Some of the dicta, however, of the judges in the case last cited, which seem to go the length of holding such a contract absolutely void, have not been supported in all their fulness; and it has been recently held that the contract of a man too drunk to know what he is about, is voidable only, and not void, and therefore capable of ratification by him when he becomes sober (*u*).

I have now to direct your attention to aliens. And we again subdivide this class into two minor ones, of alien friends, and alien enemies.. With regard to *alien*

(*t*) 13 M. & W. 623.

(*u*) *Matthews v. Baxter*, L. R. 8 Ex. 132; 42 L. J. (Ex.) 73.

him when drunk: *Eaton v. Perry*, 29 Mo. 96. If intoxication is carried so far that the reasoning powers are destroyed, the contract is void; but when it falls short of this, the contract will not be avoided, unless undue advantage has been taken by one party of the condition of the other: *Birdsong v. Birdsong*, 2 Head, 289; *Mansfield v. Watson*, 2 Iowa, 111; *Johnson v. Rockwell*, 12 Ind. 76. One found by inquisition to be an habitual drunkard is thereby rendered incompetent subsequently to enter into a contract which will bind his estate: *Imhoff v. Witmer*, 31 Pa. St. 243. See, generally, *Henry v. Ritenour*, 31 Ind. 136; *Caulkins v. Fry*, 35 Conn. 170; *Phelan v. Gardner*, 43 Cal. 306; *Reinskopf v. Rogge*, 37 Ind. 207; *Joest v. Williams*, 42 Ind. 565; *Johns v. Fritchey*, 39 Md. 258. [*McSparran v. Neeley*, 91 Pa. St. 17; *Miller v. Finley*, 26 Mich. 249; *Scanlan v. Cobb*, 85 Ill. 296. A drunkard is liable for necessities furnished for his support: *Meares, in re*, 10 Ch. Div. 552; *Sawyer v. Lufkin*, 56 Me. 309; *Darby v. Cabannè*, 1 Mo. App. 126.]—s.

friends, they have a right to contract with the subjects of this country, and may sue on such contracts in the Courts of this country (*v*), whether the contract was made in England or abroad; with this distinction, that if it was made in England, it is expounded according to the law of England;¹ if abroad, according to the law of the country where it was made (*x*). But, [*366] *whether it was made abroad or in England, the person who sues on it here must take the remedy here as he finds it, although, perhaps, abroad there might have been a more advantageous one. Thus, for instance, to an action on a bill of exchange, the French period of limitation is *five* years, ours is *six*; now, if an action be brought here on a French bill, the courts here will not adopt the French period of limitation, but our own, and so the payee may recover here at any time within six years, though in France, where the bill was made, he must have brought his action within *five*; the reason for which is, that the period of limitation within which a remedy is to be pursued is part and parcel of the remedy itself, and, though a

(*v*) Bac. Abr. Aliens, D.; Com. Dig. Alien, C. 5.

(*x*) For the application of the principle in the case of bills of exchange, see now 45 & 46 Vict., c. 61 (Bills of Exchange Act, 1882), s. 72. Where the subject-matter of the contract is real property, there the *lex loci rei sitæ* applies wherever the contract is made. See *Adams v. Clutterbuck*, 10 Q. B. D. 403; 52 L. J. (Q. B.) 607.

¹ Provided the subject of the contract be personal property. But it is well settled on this side of the Atlantic that any interest or title to real estate can only be acquired or transferred according to the *lex loci rei sitæ*, and not according to the *lex loci contractus*: *Cutter v. Davenport*, 1 Pick. 81; *Hosford v. Nichols*, 1 Paige, 220; *Chapman v. Robertson*, 6 Paige, 630; *Wills v. Cowper*, 2 Ohio, 124. Such, too, seems to be the law in England: *Robinson v. Bland*, 1 W. Black. 246; 2 Burr. 1079; *Scott v. Allnutt*, 2 Dow & Cl. 412; *Fergusson on Mar. & Div.* 395; *Curtis v. Hutton*, 14 Ves. Jr. 541; *Birtwhistle v. Vardill*, 5 B. & C. (11 E. C. L. R.) 438; 9 Bligh. 32. Some of the foreign jurists, however, do not recognise this distinction between movables and immovables. See Story's Conflict of Laws, § 52, &c.—R.

contract is interpreted by the law of the country where it is made, the *remedy* must be pursued as it exists in the country where the suit is brought (y).

I have rather digressed, for the purpose of pointing out these two rules to you. They are two of [*367] *the most celebrated principles of our law, and there is scarcely any question arising on a foreign contract which they will not solve (z).¹

So far with regard to contracts made with alien friends; now with regard to *alien enemies*, i. e., aliens whose government is at war with this country. All contracts made with them are wholly void (a).² Indeed, in one case it was decided, that, if the contract was made during war, it does not become capable of

(y) *Huber v. Steiner*, 2 Bing. N. C. (29 E. C. L. R.) 202; *Cocks v. Purday*, 5 C. B. (57 E. C. L. R.) 860; *Leroux v. Brown*, 12 C. B. (74 E. C. L. R.) 801; 22 L. J. (C. P.) 1; *Ruckmaboye v. Mottichund*, 8 Moo. P. C. 4. See, also, *De Greuchy v. Wills*, 4 C. P. D. 362; 48 L. J. (Q. B., etc.) 726; cited more fully, *ante*, p. *333; *Alliance Bank of Simla v. Casey*, 5 C. P. D. 429; 49 L. J. (C. P.) 781. In this case an action on a bond executed in India was held not barred here till after twenty years. In India specialty debts have no greater efficacy than simple contract debts, and are barred in three years.

(z) They are carried out and explained in *British Linen Company v. Drummond*, 10 B. & C. (21 E. C. L. R.) 903; and *De la Vega v. Vianna*, 1 B. & Ad. (20 E. C. L. R.) 284. See, also, the notes to *Mostyn v. Fabrigas*, 1 Smith, L. C. pp. 693. *et seqq.*, 8th ed.; and *Story's Conflict of Laws*.

(a) *Brandon v. Nesbitt*, 6 T. R. 23; *De Wahl v. Braune*, 25 L. J. (Ex.) 343; 1 H. & N. 178; *Willison v. Patteson*, 7 Taunt. (2 E. C. L. R.) 439; *Esposito v. Bowden*, 27 L. J. (Q. B.) 17; 7 E. & B. (90 E. C. L. R.) 763.

¹ The student will find all the law upon this interesting subject collected in the 8th and 14th Chapters of *Story's Conflict of Laws*.—R.

² There is an exception to this rule which naturally springs from it, which is, that contracts made with an alien enemy for the payment of ransom-money or for subsistence, can be enforced. Thus, in *Antoine v. Morshead*, 6 Taunt. (1 E. C. L. R.) 237, an alien to whom was endorsed a bill of exchange, drawn by one English subject, detained a prisoner in France, upon another subject, was held entitled to recover its amount in England after the return of peace.

In the well-known case of *Griswold v. Waddington*, 15 Johns. 57, in error, 16 Ib. 438-510, the whole law upon the subject of contracts with alien enemies was elaborately examined in an able opinion by Mr. Chancellor Kent.—R.

being enforced even on the return of peace; although, if a contract be made with an alien friend, and a war afterwards breaks out between his country and this, the effect is to suspend his right to sue upon the contract until the return of peace, not wholly to disqualify him from suing (*b*).

It seems sufficiently connected with the subject of this work to add, that by the Common Law, aliens may acquire and possess within this realm, by gift, trade, or other means, any goods personal whatever, as well as an Englishman (*c*). And by *the Naturalization [*368] Act, 1870 (33 & 34 Vict., c. 14), s. 2, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject.

Another class of persons who are disabled from enforcing contracts are outlaws (*d*), and persons under sentence for felony (*e*). They are, however, liable upon the contracts made by them while in that situation, though incapable of taking advantage of them (*f*). This disability is removed by pardon; and when the attainder or outlawry is removed, the party may contract and sue as before (*g*). It should be observed, however, that the law as to the inability of felons to

(*b*) *Flindt v. Waters*, 15 East, 260; *Alcenius v. Nygrin*, 24 L. J. (Q. B.) 19.

(*c*) *Calvin's Case*, 7 Co. Rep. 1.

(*d*) Outlawry in civil proceedings is abolished by 42 & 43 Vict., c. 59 (Civil Procedure Acts Repeal Act, 1879), s. 3.

(*e*) *Bullock v. Dodds*, 2 B. & A. (5 E. C. L. R.) 258.

(*f*) *Ramsey v. Macdonald*, Foster, C. L. 61.

(*g*) Bac. Abr. "Outlawry," H.

enforce contracts has been modified by 33 & 34 Vict., c. 23, which was passed on the 4th of July, 1870. Sect. 1 of that Act provides that, "from and after the passing of this Act, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo* [*369] **de se*, shall cause any attainer or corruption of blood, or any forfeiture or escheat, provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry." The Act then, in sect. 6, defines the word "convict," as thereafter used, to mean any person against whom, after the passing of the Act, judgment of death or penal servitude shall have been pronounced or recorded by any court of competent jurisdiction in England, Wales, or Ireland, upon any charge of treason or felony. Sect. 7 states when a "convict" ceases to be subject to the operation of the Act. And sect. 8 disables a "convict" from suing or making any contract while subject to the operation of the Act. Sect. 30, however, suspends the disabilities of sect. 8 as to a "convict" lawfully at large under a license.

There is one other class, I was about to say of individuals, but that would have been incorrect (for, although *persons* in the eye of the law, they are not individuals in common parlance), regarding whose power of contracting I have a few words to say,—I mean *corporations aggregate*. A corporation aggregate consists, as you know, of a number of individuals united in such a manner that they and their successors constitute but one person in law. Thus, the mayor, aldermen, and burgesses of a borough are a corporation, and as such have an existence distinct from that of the individual mayor, and of the individuals enjoying the franchise of burgess, *or post of alderman. But [*370] then, this corporate existence being an ideal one, and the creature of the law, it is obviously impos-

sible that the corporation can contract in the same way as an ordinary person. Accordingly the law, the creature of which, as I have said, it is, has provided for it a mode of contracting, namely by its common seal, which, being affixed to the contract, authenticates it, and makes it the deed of the corporation; and, as a general rule, that is the only way in which a corporation can contract (*h*).¹ A few instances will show the force and the application of this important rule. Thus, in the *Mayor of Ludlow v. Charlton* (*i*), the defendant had laid out a sum of money in pulling down and altering an inn and doing other work, at the request and for the convenience of the corporation, confiding in their promise to pay him that sum for such work; but though he laid out more than that sum, he was unable to charge the corporation with it, from having neglected the very obvious and easy mode of binding the corporation by deed, as the law prescribes. Even an entry by the corporation in their own books of a minute of this agreement, was not admitted to bind them. In *Arnold v. The Mayor of Poole* (*j*), the plaintiff had performed [*371] *the duties of attorney to the corporation of that place, which had incurred a large debt to him; but having only been appointed by the mayor and council, and not under the seal of the borough, he could not recover his costs, although the counsel of the

(*h*) Com. Dig. Franchises, F. 13.

(*i*) 6 M. & W. 815.

(*j*) 4 M. & G. (43 E. C. L. R.) 860. See *Queen v. Mayor, &c., of Stamford*, 6 Q. B. (51 E. C. L. R.) 433.

¹ A corporation may adopt the seal of another, or an ink impression: *Crossman v. Hilltown Co.*, 3 Grant, 225. When agents executing an instrument in behalf of a corporation, sign their own names and affix their own seals, such seals, are merely nugatory; and the instrument will be binding on the corporation as a simple contract if it is in other respects valid: *Regents v. Detroit Society*, 12 Mich. 138.—s.

borough had passed a resolution directing the business to 'be done by him, and knew of its progress. In *Paine v. The Guardians of the Poor of the Strand Union* (*k*), the guardians, who are a corporation by statute, had ordered the plaintiff, a surveyor, to make a survey and a map of the rateable property in a parish which was part of the union, but as the plaintiff had not insisted upon having his retainer under seal, he was unable to recover for the survey or the map.

This general rule, however, has from the earliest traceable periods been subject to exceptions,¹ the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit, that a merely circumstantial difference excludes from the exception. This principle appears to be convenience, amounting almost to necessity. Hence, the retainer by parol of an inferior servant, authorizing another to drive away cattle, damage feasant, to make a distress or the like, the doing of acts very frequently recurring, or too insignificant
[*372]
*to be worth the trouble of affixing the com-

(*k*) 8 Q. B. (55 E. C. L. R.) 326.

¹ Mr. Morawetz (*Private Corporations*, § 167) says: "It [the rule that a seal is essential] was never rigorously applied in all cases (which shows that it did not result from the nature of a corporation); and in modern times the ancient rule has been wholly discarded. It is now a rule well settled throughout the United States, that a corporation may make a contract without the use of a seal, in all cases in which this may be done by an individual; and it is equally well settled that an agent of a corporation may be appointed without the use of a seal, whatever may be the purpose of the agency. The English Courts have held more firmly to the time-honored doctrine; but even in England it is settled law that a private corporation established for purposes of trade or traffic has implied authority to make any contract in the direct course of the business which it was chartered to carry on, without the use of the corporate seal, in the same manner as an individual." He cites numerous authorities. And see *infra*, p. *379, note 1.

mon seal, are established exceptions. In such cases the head of the corporation has from the earliest time been considered as delegated by the rest to act for them (*l*). Much illustration as to these acts is afforded by the case of *Smith v. Cartwright*, decided in the Exchequer Chamber (*m*). It was an action by one of the coal-meters of King's Lynn, for disturbance in his office of coal-meter, in the exercise of which he claimed the right to weigh coals brought into the port, and to take a certain fee for weighing them; and it became a material question whether he was duly appointed meter or not. He had not been appointed under seal. The Court held, that, as the right he claimed was to discharge certain duties in regard to the property of third persons altogether against their will, and to demand a fee for so doing, this right must be by reason of his having an office, and not being a mere servant of the corporation, and consequently his appointment must, in order to be valid, be under the seal of the corporation. Had this not been so, but if the corporation had merely claimed a right to measure by persons appointed by themselves, such persons would be merely servants, and might well be appointed without seal. You will also see an enumeration of these *acts in Com. [*373] Dig. Franchises, F. 13 (*n*). They are treated by the Court of Common Pleas, in the great case of *The Fishmongers' Company v. Robertson* (*o*), as so well known as to require no enumeration in the judgment of the Court. They are apparently as ancient as the doctrine to which they are commonly stated to be exceptions. They do not depend upon any one principle,

(*l*) *The Mayor of Ludlow v. Charlton*, *ante*, p. *370.

(*m*) 20 L. J. (Ex.) 401; 6 Ex. 927, S. C.

(*n*) See Bro. Abr. Corp. K.; and in *Horn v. Ivy*, 1 Vent. 47.

(*o*) 5 M. & Gr. (44 E. C. L. R.) 192.

other than that of convenience, amounting almost to necessity, which belongs to them in their very nature, and under which they are ranked by the Court of Queen's Bench in *Church v. Imperial Gas Light Company* (*p*). There is, however, a distinction between matters which do and matters which do not affect any interest of the corporation. The former must be authorized by the corporate seal. Thus, they must appoint a bailiff by deed for entering upon lands for condition broken, in order to revest their estate; but they need not do so where the bailiff is only to distrain for rent (*q*). To this rule also, the convenience of the world has occasioned some other exceptions; the principle of which is, that, when a corporation has been created for mercantile purposes, it is *allowed to enter without seal into [374] certain contracts, which are usually entered into without seal by commercial men. Such a corporation for instance may have power to accept bills of exchange, but the power must either be expressly given it, *e. g.*, by Act of Parliament, or must be necessarily implied from the nature of the business in which the corporation is engaged. A railway company incorporated in the usual way has no such power (*r*). In the case of *Church v. The Imperial Gas Light Company* (*s*) the defendants were empowered, by the Act incorporating

(*p*) 6 A. & E. (33 E. C. L. R.) 846.

(*q*) *Smith v. Birmingham Gas Co.*, 1 A. & E. (28 E. C. L. R.) 526; *Parol v. Moor*, Plow. 91; *Jenkins*, 3rd Cent. case, 68. See *Hall v. Mayor, &c.*, of Swansea, 5 Q. B. (48 E. C. L. R.) 526.

(*r*) *Bateman v. Mid-Wales Rail. Co.*, L. R. 1 C. P. 499; 35 L. J. (C. P.) 205; *Broughton v. Manchester Water Works*, 4 B. & Ald. (6 E. C. L. R.) 1. See also *Smith's Mer. Law*, 9th ed., by Dowdeswell, pp. 81, 82. As to the power of companies incorporated under the "Companies Act, 1862," to accept bills of exchange, see *post*, p. *400.

(*s*) 6 A. & E. (33 E. C. L. R.) 846; *R. v. Bigg*, 3 P. Wms. 419; *Beverley v. Lincoln Gas Co.*, 6 A. & E. (33 E. C. L. R.) 829; *Clarke v. The Guardians of the Cuckfield Union*, 21 L. J. (Q. B.) 349; *Nicholson v. Bradford Union*, 35 L. J. (Q. B.) 176; L. R. 1 Q. B. 620.

them, to make gas, and to sell and dispose of it in such manner as they should think proper, with full power to supply and light with gas the shops, houses, streets, &c., in the places mentioned. The statute further enacted that the directors should have the custody of the common seal, with full power to use it for the affairs and concerns of the company, and should have power to direct and transact the affairs and business of the company, as well in laying out and [*375] *disposing of money for the purposes of the same, as in contracting for and purchasing lands and tenements, materials, goods and chattels for the use of the company, &c., and selling and disposing of all lands, &c., and all articles produced as aforesaid. The defendants entered into a simple contract with the plaintiff, to supply him with gas at a certain rate, and the Court held that they had power to enter into this contract, and to sue in *assumpsit* for the price of the gas supplied. "The general rule of law," said the Court in delivering its judgment, "is that a corporation contracts under its common seal; as a general rule it is only in that way that a corporation can express its will, or do any act. Whenever to hold the rule applicable would occasion a great inconvenience or tend to defeat the very object for which the corporation was created, the exception has prevailed. On the same principle stands the power of accepting bills of exchange and issuing promissory notes by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon. We must understand this company to have been incorporated for the purpose of supplying individuals willing to contract with them for gas-light. Such contracts are of almost daily occurrence, and to hold that for every one of them, of the same or less amount, it was necessary to affix the com-

mon seal, would be so seriously to impede the corporation in fulfilling the very purpose for which it was created, that *we think we are bound to hold [*376] the case fairly brought within the principle of the established exceptions."

Upon similar reasoning where the Australian Mail Steam Navigation Company (which was constituted a trading corporation by charter for the purpose of maintaining a communication by steam and other vessels for carrying passengers, &c., between Great Britain and Australia), in the performance and for the more effectual prosecution of the objects of their charter, and by a resolution of the directors duly entered into as required by the charter, made a parol agreement with the plaintiff, that in consideration of his going to Sidney to bring home one of their ships which was supposed to be unseaworthy and uninsurable, they would pay his passage out to Sidney and allow him a remuneration for his said services; the Court of Queen's Bench decided that this contract being entered into by the company and performed by the plaintiff for the express purpose of preserving the ship and maintaining the communication and carriage of passengers, &c., between Great Britain and Australia, the company were liable to pay him notwithstanding that the contract was not under seal (*t*). In another case in which the same company were the plaintiffs, and in which they had brought by parol contract of the defendants a quantity of ale *for the use of the passengers on board their steam vessel, and paid the defendants for [*377] the same, but the ale proved unfit for use; the Court of Exchequer held, that the contract, although not under seal, yet being executed, the defendants were

(*t*) *Henderson v. The Australian R. M. Steam Nav. Co.*, 24 L. J. (Q. B.) 322; 5 E. & B. (85 E. C. L. R.) 409.

liable to the plaintiffs in damages (*u*). Again, where a company incorporated under the Companies Act, 1862, for the working of collieries, contracted, but not under seal, with an engineer for the erection of a pumping engine and machinery for use in the colliery, and paid him part of the price; in an action by the company against the engineer for a breach of contract in refusing to deliver the engine and machinery, it was held that the action was maintainable though the contract was not under seal (*v*).

But unless the nature of the business for which the corporation was created, necessarily implies the existence of these powers of contracting otherwise than by deed, it will not have them.¹ Thus it has been held (*w*)

(*u*) *The Australian R. M. Steam Nav. Co. v. Marzetti*, 24 L. J. (Ex.) 273; 11 Ex. 228; *Reuter v. Electric Telegraph Co.*, 26 L. J. (Q. B.) 46; 6 E. & B. (88 E. C. L. R.) 341.

(*v*) *South of Ireland Colliery Company v. Waddle*, L. R. 3 C. P. 463; 4 C. P. 617 (Ex. Ch.) *S. C.*, 37 L. J. (C. P.) 211; 38 Ib. 338. See however now, stat. 30 & 31 Vict., c. 131, s. 37 (*post*, p. *399), as to the contracting power of companies incorporated under the Companies Act, 1862.

(*w*) *Gibson v. East India Co.*, 5 Bing. N. C. (35 E. C. L. R.) 262.

¹ It is a general principle that a corporation has no power to enter into any contract, not within the scope of the objects for which it has been chartered, and it has been held that even where it has received and enjoyed the consideration, it may in a suit upon the contract take advantage of its defect of power. In such cases, however, the consideration may be recovered back: *Albert v. Savings Bank of Baltimore*, 1 Md. Ch. 407; *Abbott v. Balt. & R. Steam Packet Co.*, Ib. 542; *Beers v. Phoenix Glass Co.*, 14 Barb. 358. Corporations are bound to follow strictly the letter of the charter, and can exercise no power unless granted to them or absolutely necessary to carry out the power so granted: *Smith v. Morse*, 2 Cal. 524; *Mechanics' Savings Bank v. Meriden Agency Co.*, 24 Conn. 159; *Berry v. Yates*, 24 Barb. 199; *Cincinnati R. R. Co. v. Clarkson*, 7 Ind. 595; *Morris R. R. Co. v. Newark*, 10 N. J. Eq. 352; *Smith v. Eureka Flour Mills*, 6 Cal. 1; *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59; *Aurora v. West*, 9 Ind. 74; *Madison Plank Road Co. v. Watertown Co.*, 5 Wis. 173; *Downing v. Mount Washington Co.*, 40 N. H. 230; *Parish v. Wheeler*, 22 N. Y. 494; *Rock River Bank v. Sherwood*, 10 Wis. 230. The express powers of a corporation must be exercised in the manner pointed out by the statute, but the powers merely incident thereto may be exercised by its officers or agents: *Smith v. Eureka Flour Mills*, 6 Cal. 1;

that when the East India Company granted a retiring pension to a military officer* for *services performed to them in the East Indies, but did not grant it under their common seal, the grant did not fall within the reason or principle of the exception, but must be governed by the general rule of law, that a corporation cannot be sued upon a contract, unless under seal. It is, indeed, obvious that the grant of this pension could have no connexion whatever with the condition or powers of the company as a trading community, and consequently that it is not within the exception which has been established as to contracts entered into by corporations instituted for the purposes of trade in matters relating to their trade, or within that respecting matters of daily occurrence and slight importance, which has been alluded to. And where the Governor and Company of Copper Miners (x) entered into a parol contract with a person to supply him with a large quantity of iron bars, it was held, that as there was no evidence that the contract proved was in any way auxiliary to the trade in copper, it must be held

(x) *The Governor and Company of Copper Miners of England v. Fox*, 16 Q. B. (71 E. C. L. R.) 229; 20 L. J. (Q. B.) 174.

Southern Ins. Co v. Lanier, 5 Fla. 110; *Holland v. San Francisco*, 7 Cal. 361; *Coe v. Columbus R. R. Co.*, 10 Ohio St. 372; *Merrick v. Burlington Co.*, 11 Iowa, 74. It is well settled that a corporation may without special authority make a note or draft or accept a draft for a debt contracted in its legitimate business: *Partridge v. Badger*, 25 Barb. 146; *Hamilton v. Newcastle R. R. Co.*, 9 Ind. 359; *Lucas v. Pitney*, 27 N. J. 221; *Frye v. Tucker*, 24 Ill. 180; *Rockwell v. Elkhorn Bank*, 13 Wis. 653; *Goodrich v. Reynolds*, 31 Ill. 490. The burden of proof is upon parties impeaching the acts of corporations to show that such acts are not within its corporate powers: *Chautauqua Bank v. Risley*, 19 N. Y. 369. A corporation chartered in one State may make and enforce in another State contracts allowed by its charter, and not in violation of the public policy or laws of the latter State: *Bard v. Poole*, 12 N. Y. 495; *Wright v. Bundy*, 11 Ind. 398. But see *Merrick v. Brainard*, 38 Barb. 574.—s.

not a contract entered into for the purpose of carrying on the trading object for which the plaintiffs were incorporated, and did not bind them; and consequently, as there was no consideration for the defendant's promise, that he was not bound to perform it. In like [*379] manner, where the London Dock Company, a *corporation instituted for the purpose of carrying on a particular trade, entered into a contract for the cleansing and removing the filth and dirt accumulating in their docks and basins; the Court held that such a contract ought to have been under the corporation seal, as it was not a contract of a mercantile nature; nor was it with a customer of the Company, nor was it of a character which created an impossibility that it should be under seal (*y*). But where a trading company is created by charter, while acting within the scope of the charter, it may enter into the commercial contracts usual in the trade which the company is to carry on, in the usual manner (*z*). Some acts of trifling importance which every corporation may do without deed, have been already mentioned.¹

(*y*) *London Dock Company v. Sinnott*, 27 L. J. (Q. B.) 129; 8 E. & B. (92 E. C. L. R.) 347.

(*z*) *Copper Miners' Co. v. Fox*, *supra*.

¹ The excepted cases referred to in the decision in *The East London Waterworks Co. v. Bailey*, were, 1, where the contract is executed; 2, where the acts done are of daily necessity, and too insignificant for the trouble of the seal; 3, where the corporation has a head, as a mayor or a dean, who may give commands; 4, where the act should from necessity be done immediately; and 5, where it is essential to a moneyed corporation, like the Bank of England, that it should have the power of issuing bills and notes. But the distinction between executed and executory contracts, which was the foundation of the first of these exceptions, was directly overruled in *Church v. The Imperial Gas Co.*, 6 A. & E. (33 E. C. L. R.) 846. That case, which decided that a corporation might maintain assumpsit for breach of an unsealed contract to accept gas from year to year at so much per annum, was rested on the second and fifth of the above exceptions, the contract being one of daily occurrence, and almost essential ("convenience amounting almost to necessity"), for the purpose of the

Contracts, although for things necessary, cannot be enforced against "urban authorities" created by the Public Health Act, 1875 (38 & 39 Vict., c. 55), if for an amount exceeding £50, unless under their common seal. These are corporations created for public purposes, not trading or commercial corporations having gain for their object; and under section 174 of the above Act "every contract made by an urban authority whereof the value or amount exceeds £50, shall be in

corporation; and all the recent cases in England have been decided upon the same grounds: *Beverly v. The Lincoln's Inn Gas Light and Coke Co.*, 6 A. & E. (33 E. C. L. R.) 829; *Paine v. Strand Union*, 8 Q. B. (55 E. C. L. R.) 326; *Mayor of Ludlow v. Charlton*, 6 M. & W. 824; *Lamprell v. The Billericay Union*, 3 Exch. 306; *Diggle v. London and Blackwall Railway Co.*, 5 Ib. 442; *Finlay v. Bristol and Exeter Railway Co.*, 9 Eng. Law & Eq. R. 483.

On this side of the Atlantic, however, a much more relaxed rule prevails, and it has long been settled that there is no distinction between the contracts of a corporation and a natural person, whether they are express or implied, either from acceptance of an executed consideration or from the ratification of acts done on its behalf by its members or others: *Bank U. S. v. Dandridge*, 12 Wheat. 64; *Proprietors v. Gordon*, 1 Pick. 297; *Ross v. City of Madison*, 1 Smith, 98; *Gassett v. Andover*, 21 Vt. 342; and see many other cases collected in *Angell and Ames on Corporations*, 211, 212; 2 *Kent's Com.* 290 (whose statement of the law is referred to by *Patteson, J.*, in *Beverly v. Gas Co.*, *supra*), and the note to *Mayor v. Charlton*, 6 M. & W. 815, Am. ed.—R.

The acts of a corporation, evidenced by a vote, written or unwritten, are as completely binding upon it, and as full authority to its agents, as the most solemn acts done under the corporate seal; and promises and engagements may as well be implied from its acts and the acts of its agents as if it were an individual: *Elysville Manufacturing Co. v. Okisko Co.*, 1 Md. Ch. 392; *Conro v. The Port Henry Iron Co.*, 12 Barb. 27; *Ross v. Madison*, 1 Ind. 281. Promises are implied against corporations in the same cases as against natural persons: *San Antonio v. Lewis*, 9 Tex. 69. The appointment of an agent may be implied: *Planters' Bank v. Bivingsville Cotton Co.*, 10 Rich. 95; *Alabama R. Co. v. Kidd*, 29 Ala. 221; *Hamilton v. Newcastle R. R. Co.*, 9 Ind. 359; *Buckley v. Briggs*, 30 Mo. 452; *Brown v. Donnell*, 49 Me. 421; *Allen v. Citizens' Co.*, 22 Cal. 28. The vote of the directors of a bank to accept one security in the place of another may be proved by parol, when no record is made of it: *Ryan v. Dunlap*, 17 Ill. 40; *Southern Hotel Co. v. Newman*, 30 Mo. 118. As against the minority, a majority of the stockholders or board of directors of a corporation cannot legally deviate from the undertaking which was originally contemplated between the parties: *Kean v. Johnson*, 9 N. J. Eq. 401.—S.

[*380] writing, and sealed with *the common seal of such authority" (a). This enactment is obligatory and not merely directory, and applies to an executed contract of which the urban authority has had the full benefit and which has been effected by its agent duly authorized under the common seal of the authority (b). It has also been held that as the words "every contract . . . whereof the value or amount exceeds £50" are in the present tense, the words "at the time of making t," must be read into the enactment. The contract, therefore, in order to be rendered invalid must be one which exceeds £50 at the time it is entered upon, not one which may possibly exceed £50 at some future time. Thus, where on the occurrence of an outbreak of fever, a medical man made a verbal agreement with an urban sanitary authority to attend the patients who were in tents at the rate of 5s. 3d. per tent per day, and he attended until the amount due was nearly £100, it was held that the urban sanitary authority was liable on this contract, inasmuch as at the time of entering into it the parties had not *ascertained that it [*381] would necessarily exceed £50 (c).

There is an important class of parties to contracts, most of which at the present day are of the nature of

(a) Sect. 85 of the now repealed Public Health Act, 1848 (11 & 12 Vict., c. 63), contained a similar provision as to "local boards," where the value or amount exceeded £10.

(b) *Young v. Corporation of Leamington*, 8 App. Cas. 517; 52 L. J. (Q. B.) 713 (H. L.), affirming *S. C.* 8 Q. B. D. 579; 51 L. J. (Q. B.) 292, and following *Hunt v. Wimbledon Local Board*, 3 C. P. D. 208, 47 L. J. (C. P.) 540; 4 C. P. D. 48; 48 L. J. (C. P.) 207.

(c) *Eaton v. Basker*, 7 Q. B. D. 529 (C. A.); 50 L. J. (Q. B.) 444; reversing on this point *S. C.* 6 Q. B. D. 201; 50 L. J. (Q. B.) 194. In *Att.-Gen. v. Gas-kill*, 22 Ch. Div. 537; 52 L. J. (Ch.) 659, Bacon, V.-C., held that an agreement to settle an action brought by a local board to restrain defendant from obstructing a foot-path, on the terms that defendant should pay the costs of the board, was not within the above enactment, and might be enforced, though not under seal, and although the costs amounted to more than £50.

trading corporations, which ought not to be passed over without mention, though our consideration of them must be necessarily brief, I mean public or joint stock companies. Nearly all of these are of recent origin, most of them very recent. Some of these companies are incorporated, and others not, and some important attributes exist peculiar to different stages of their growth, from a mere party of individuals combining to promote the formation of a company, until they have achieved their object by effecting its incorporation. All these companies are created for some definite and prescribed object, and have already been slightly mentioned in treating of the power of corporations to contract.

Previously to the passing of the statutes hereafter mentioned, so great a number of joint stock [*382] *companies had been established, and so many more were projected, each striving to attain its object by means of its own, none having any regard to the provisions of the law in analogous cases, and many violating them, that the greatest confusion and uncertainty were introduced into their transactions, and lamentable frauds and oppressions were committed. Several Acts of Parliament were passed remedying some of these evils, but being found insufficient, the Legislature passed some general enactments, of which the most important for the present purpose are, the Act for the Registration, Incorporation, and Regulation of Joint Stock Companies, 7 & 8 Vict., c. 110, which came into operation on the 1st of November, 1844; the Companies Clauses Consolidation Act, 1845, 8 Vict., c. 16; the Lands Clauses Consolidation Act, 1845, 8 Vict., c. 18; and the Railway Clauses Consolidation Act, 1845, 8 Vict., c. 20. The statute 7 & 8 Vict., c. 110, was indeed repealed by 19 & 20 Vict., c. 47; but as to insurance

companies registered under it, and as to new companies for insurance, it was revived by 20 & 21 Vict., c. 80. The statute 19 & 20 Vict., c. 47, now repealed, applied to companies the principle of limited liability. Existing companies might come under its operation, and joint stock banks established since May 5, 1844, were subjected to it by 20 & 21 Vict., c. 49. There was also a statute regulating joint stock banking companies, [*383] *7 Geo. IV., c. 46, by which, and by 7 & 8 Vict., c. 113, that important class of public companies was governed. Finally, there is "The Companies Act, 1862" 25 & 26 Vict., c. 89, which has repealed most of the former Acts, and has established a system which varies much from the ordinary rules of law, and which can be learnt only by a careful study of the statute itself, and of the decisions of the Courts upon the questions which have occurred in applying it to practice. This Act has since been amended by the following Acts, viz.:—30 & 31 Vict., c. 47, c. 131 (the Companies Acts, 1867); 33 & 34 Vict., c. 104 (the Joint Stock Companies Arrangement Act, 1870); 40 & 41 Vict., c. 26 (Companies Act, 1877); 42 & 43 Vict., c. 76 (Companies Act, 1879); 43 Vict., c. 19 (Companies Act, 1880); 46 & 47 Vict., c. 28 (Companies Act, 1883).

It will be necessary to advert to some extent to the principles of the decisions pronounced before "The Companies Act, 1862," for the sake of explaining the law applicable to such companies as do not come within its enactments, though it is evident that for many companies established before the passing of that Act, the law is different from that by which companies since established are regulated.

"A joint stock company is a partnership consisting for the most part of a very large number of members,

whose rights and liabilities would be *precisely [*384] the same as those of any other partners, did not their multitude oblige them to adopt certain peculiar regulations for the government of the concern, which are ordinarily contained in an instrument called a deed of settlement. Such is a joint stock company, the conduct of whose affairs has not been affected by the general enactments, which have been mentioned. Such bodies still exist, but frequently the impossibility or great inconvenience of carrying on their business upon such a footing has induced them to add to the deed of settlement an Act of Parliament passed expressly for their own purposes" (d).

It is common, as you are no doubt aware, to companies generally, that the joint stock or capital is divided into equal parts, called shares, the number of which belonging to any member ascertains the amount which he has contributed to that stock or capital, and his consequent interest in the undertaking. The members or shareholders delegate all the ordinary business of the company to certain of its members, in whom they confide, and who are usually called directors, but reserve to themselves the right to interfere on specified occasions, together with a general control and superintendence.

It is also common to companies generally that, in all cases which are not regulated by the deed of settlement and the private, or as it is called, special *Act, [*385] or by one or other of the general statutes we have mentioned, the common law prevails, and the rules apply which would apply to an ordinary partnership (e); and, on the other hand, the parties, having

(d) Smith's Mercantile Law, 6th ed., by Dowdeswell, p. 59; and see p. 56; 9th ed.

(e) Holmes v. Higgins, 1 B. & C. (8 E. C. L. R.) 74; Wilson v. Curzon, 15 M. & W. 532.

exchanged their mutual rights at common law for those stipulated for in their deed, are bound by the latter, and cannot, as a general rule, act otherwise than in the stipulated manner. These results have been made very clear by the judgment of the Court of Exchequer, in *Bosanquet v. Shortridge* (*f*), in which case the deed of settlement had provided that no person should be registered as a shareholder without the consent of the board of directors; and it was endeavoured to be shown that the defendant had ceased to be a shareholder, having actually sold his shares to another, although the transfer was not with the consent of the board of directors. "It is necessary," said the Court, "that Courts of Justice should act on general rules, without regard to the hardship which in particular cases may result from their application. This is the case of a joint stock company regulated by deed. All persons executing the deed are bound by whatever is done in pursuance of its provisions, but they are bound no further. The original body of shareholders agreed to trade in partnership, [*386] and *they further agreed that, by a certain stipulated mode, any one of this body might transfer his share to another to be substituted in his place. But unless the steps pointed out by the deed for making such transfer have been duly taken, the original body of shareholders remain partners, according to the terms of their deed of settlement. If, indeed, a case could be conceived where all the shareholders, at a particular time, had assented to a mode of transfer different from that stipulated for in the deed, they might be bound by what they had so agreed to. But such a state of things could hardly happen to a joint stock company like that in which the defendant was a

(*f*) 4 Exch. 699; 22 L. J. (Ch.) 49; *Kirk v. Bell*, 16 Q. B. (71 E. C. L. R.) 290; *Watson v. Eales*, 26 L. J. (Ch.) 361.

member; and certainly no universal consent can be taken to have existed here." The defendant was held to be still a member.

The above case of *Bosanquet v. Shortridge*, illustrates a great inconvenience felt by a joint stock company established by deed, *viz.*, that no member can transfer his share without the consent of the rest; for such a company being, in most particulars, an ordinary partnership, the consent of each partner is necessary to the introduction of a new one; although it has been considered, that where the nature of the company was such that the members could not have intended that there should be no change in their body without their consent, such a consent was not necessary (*g*). Thus, great *doubts and difficulties and disputes have un- [387] avoidably arisen in endeavouring to act without such consent. And in all ordinary cases the members have no peculiar rights or liabilities, but, as in ordinary partnership, are parties to all the contracts of the company, entitled to the benefit of them, and responsible for their non-performance. One of the objects, however, of the general enactments referred to (*h*), or at all events of most of them, is to prescribe the modes in which, under the operation of those statutes, such shares may be granted by the company, and transferred from holder to holder; and various modes for attaining these purposes are prescribed in the particular Acts regulating many of the companies which were established before those enactments.

It may be worth while to mention here that shares in a joint stock company, although it be seised of land and possessed of goods as well as of the property in

(*g*) *Fox v. Clifton*, 9 Bing. (23 E. C. L. R.) 119; *Waterford & Dublin Ry. Co. v. Pidcock*, 22 L. J. (Ex.) 146; 8 Ex. 279.

(*h*) *Ante*, p. *382.

which it commonly deals, do not fall within the 4th section of the Statute of Frauds as an interest in land, or within the 17th section as goods, wares, or merchandise (*i*);¹ but in the absence of any enactment making them the one or the other, are personal property, and mere choses in action, and consequently are transferable by parol (*k*).

[*388] *If the approbation of the directors be required as a preliminary to the transfer, it must of course be procured (*l*), and that by the vendor, who must do everything necessary to vest the property in the purchaser (*m*), although it is generally for the purchaser to prepare and tender the conveyance (*n*). And, therefore, when the shares are by the provisions of an Act of Parliament transferable by deed only, the purchaser must tender a deed to the seller for execution before he can sue for not transferring them; and a sealed instrument of transfer, having the name of the vendee in blank at the time when it is sealed and delivered, is invalid, not being a legal deed (*o*).²

When a person has become a member of a joint stock company formed under a deed of settlement, he is, in all ordinary cases, unless exempted by the private or

(*i*) *Humble v. Mitchell*, 11 A. & E. (39 E. C. L. R.) 205; *Tempest v. Kilner*, 3 C. B. (54 E. C. L. R.) 249; *Bowlby v. Bell*, *Ib.* 284; *ante*, p. *142.

(*k*) *Hibblewhite v. M'Morine*, 6 M. & W. 214.

(*l*) *Bosanquet v. Shortridge*, 20 L. J. (Ex.) 57; 4 Exch. 699, *S. C.*

(*m*) *Ib.*; *Wilkinson v. Lloyd*, 7 Q. B. (53 E. C. L. R.) 27.

(*n*) *Stephens v. De Medina*, 4 Q. B. (45 E. C. L. R.) 422

(*o*) *Hibblewhite v. M'Morine*, 6 M. & W. 200

¹ In some American cases, however, a contrary opinion has been maintained: *Tisdale v. Harris*, 20 Pick. 13; *Boardman v. Cutter*, 128 Mass. 390; *Brownson v. Chapman*, 63 N. Y. 625 (the New York statute, however, covers "things in action" and is therefore broader than the English: *Tomlinson v. Miller*, 7 Abb. Pr. N. S. 368); *Pray v. Mitchell*, 60 Me. 434; *Mayer v. Child*, 47 Cal. 144; *Fine v. Hornby*, 2 Mo. App. 64; *Kauffman v. Harstock*, 31 Iowa, 473; *Southern Ins. Co. v. Cole*, 4 Fla. 378; *Vawter v. Griffin*, 40 Ind. 601.

² See *ante*, p. *6, note 2.

general statute, entitled to the benefits of all its contracts, and responsible for the engagements of the company made by the agents of the concern in order to carry out its purposes (*p*). But in order to charge the company or any member upon a contract, it must be proved to have been made by persons having authority from all the *shareholders to bind them by such a contract; and this may be done by proving that [*389] it was sanctioned by the persons authorized by the deed of the company to conduct its affairs (*q*). But the claimant is not confined to the deed for proof of authority. He may show in any way that the whole of the shareholders have directly or indirectly given authority to those making the contract to bind them; but to show merely that some of the directors have ordered or approved of the contract is not sufficient without also showing, that, by the deed or otherwise, they were authorized so to do. Therefore, where the deed appointed eleven directors, and declared five to be a quorum, the company was held not bound by a contract made at a board where three only were present: and this, although the company was completely registered under 7 & 8 Vict., c. 110 (*q*). And, on the other hand, where a manufacturing company had appointed a manager to superintend and transact its manufacturing business, but the general business was to be transacted by a board of directors, who had power to appoint officers and delegate their authority, and goods for the manufacture had been ordered by the manager, the chairman, the deputy-chairman, and the secretary, and were *used for the company's purposes; the Court [*390] of Common Pleas considered, that, although,

(*p*) *Harvey v. Kay*, 9 B. & C. (17 E. C. L. R.) 356.

(*q*) *Ridley v. Plymouth Baking Co.*, 17 L. J. (Ex.) 252; 2 Ex. 711, *S. C.* See *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; 29 L. J. (Ex.) 137; *D'Arcy v. Tamar, &c., Rail. Co.*, L. R. 2 Ex. 158; 36 L. J. (Ex.) 37.

with the exception of the manager, none of these officers had authority to give such orders, and although the directors did not expressly adopt them, yet, as they knew the goods so ordered had been received upon the premises of the company, and used for the purposes of its trade, the company was liable (r).

It will probably appear quite clear from what has been said before, and if not, it is sufficiently so from the very nature of the thing, that the contracts to which a member of a joint stock company becomes liable, because they are made by the agents of the company or certain of its members, must be contracts either expressly authorized by him, or appropriate in order to carry out the purposes for which the company was formed. Thus, in the celebrated case of *Dickenson v. Valpy* (s), which was an action on a bill of exchange, purporting to be drawn and accepted by a mining company, wherein the plaintiff, an endorsee for value, sought to charge the defendant as a member of that company, the Court of King's Bench held that, assuming the defendant to be a member of that company, it was incumbent on the plaintiff to prove that the directors of the company had authority to bind the [*391] other members by drawing and *accepting bills of exchange; and that, the plaintiff not having produced the deed of co-partnership, nor given any evidence to show that it was necessary for the purpose of carrying on the business of a mining company, or that it was usual for them to draw or accept bills of exchange, there was no evidence of such authority to draw or accept them. "There was not any evidence," said *Parke, J.* (afterwards Lord *Wensleydale*), "to

(r) *Smith v. Hull Glass Co.*, 21 L. J. (C. P.) 106; 11 C. B. (73 E. C. L. R.) 897.

(s) 10 B. & C. (21 E. C. L. R.) 128.

prove an authority of the parties in this concern to draw such a bill of exchange as this. I very much doubt whether there is any authority in mining companies, arising by implication from the nature of their dealings, to draw or accept bills of exchange; and it is to be observed, that there was no proof of any usage to do this in such companies. The argument would go to this, that all persons who deal in the produce of the land, which they jointly occupy, because they might sell that produce at a distance, would have an implied power given to each other to draw bills of exchange for the purpose of receiving payment for it; if the argument was valid it would show that farmers acting in partnership, as well as miners, would have, as incidental to the relation of partners, an authority to draw bills of exchange upon the persons to whom the produce of the land was sold; there is, however, no necessity to decide that point, because there is no ground, at all events, to say that mining partners have an implied authority from one another, arising from the nature of *their business, to draw such a bill of exchange [*392] as this, for, upon the face of it, this is a bill drawn by the company upon themselves, and though it is in form treated as a bill of exchange, it is in substance only a promissory note; and the effect of saying that one member of a company like this can draw such bills or notes, would be, that each of the partners in the concern would have the power of pledging the others." Still more general was the language of *Tindal*, C. J., in delivering the judgment of the Court of Common Pleas in the case of *Bramah v. Roberts* (t). In that case a bill had been drawn by one of the directors of a gas company on himself and the other directors, which was accepted by the chairman for himself and other

(t) 3 Bing. N. C. (32 E. C. L. R.) 963.

directors. This acceptance was held not to bind them, in the absence of evidence of authority given to any one of the directors to bind the other directors or the company at large by the acceptance of bills of exchange. "The address of a bill," said the Chief Justice, "to the directors of metropolitan company, and the frame of acceptance by the chairman of such directors, for himself and the other directors, can only be referable, unless some explanation is given, to a company of the description well known in all the courts of law and equity in Westminster Hall as joint stock companies, [*393] and not to the ordinary partnerships in trade. *It was proved upon the trial of the cause, that Clare, the drawer of the bill, from whom the plaintiffs derived title, and upon whose endorsement they rely, was the same William Clare who was one of the acceptors and one of the defendants in his capacity of acceptor; so that the bill is drawn by one of the directors upon himself and the other directors, payable to his own order, and accepted by another director for himself and the rest. But the right of one director to draw a bill upon the rest, and still further, the power of one director to accept a bill for himself and the others, so as to make those others liable, according to the case of *Dickenson v. Valpy (u)*, in the authority of which case we entirely concur, is not a right or power implied by law, like that which belongs to one member of an ordinary partnership in trade with respect to bills drawn and accepted for the purposes of the trade. It must depend upon the powers given by the charter or deed or agreement under which the company is established and constituted, or some other agreement between the parties, whether a bill so drawn and accepted shall or shall not have that legal effect. But upon the trial of this cause,

(u) 10 B. & C. (21 E. C. L. R.) 128.

no evidence whatever was given by the plaintiffs of the constitution of this company, nor of any authority given by deed or otherwise to any one of the directors to bind the other directors, or to bind the *com- [*394]pany at large, by his acceptance of bills of exchange; and in the absence of such evidence, we are of opinion that no such authority is to be implied by law, or can be held to exist."

With regard to the borrowing of money, unless it be part of the ordinary business of the company, as it would be of a banking company (*x*), or express powers be given them by the deed, the directors have no authority to pledge the credit of the shareholders by borrowing money, even though it be necessary to enable them to carry on the affairs of the company (*y*). It has since been held that even a clause in the deed of settlement, under which a mining company was carried on, which provided that the affairs and business of the company should be under the sole and entire control of the directors, of whom there should not be less than five or more than nine, and that three of them should at all meetings of directors, and for all purposes, be competent to act, did not authorize them to borrow money for the necessary purposes of the mines (*z*). As to dealing on credit, the question whether the company may be made liable by its agents so dealing, depends, like the others we have been considering, upon the authority given to those agents; and this authority, as in other cases, may be proved *by showing it [*395]to have been actually given, or that concerns of the nature in question are ordinarily so carried on. "The question," said Lord *Abinger*, "which was de-

(*x*) *Bank of Australasia v. Breillat*, 6 Moore P. C. C. 152.

(*y*) *Ricketts v. Bennett*, 4 C. B. (56 E. C. L. R.) 686.

(*z*) *Burmester v. Norris*, 21 L. J. (Ex.) 43; 6 Ex. 796, S. C.

cided in *Dickenson v. Valpy*, that a mining company is not necessarily formed with a power to pledge the credit of individual members by the drawing of bills, is very different from the question whether it is not formed with power to bind them by dealing on credit; whether the directors have such a power, must depend on the general nature of the concern; it is a matter for the jury to decide upon, unless the party gives evidence to show that their authority was expressly limited, and if it had been left to the jury in this case, I think they would not have had much difficulty in saying that it is in the general nature of mining concerns to deal on credit for the purpose of carrying on their business" (a). This distinction between borrowing and dealing on credit has been upheld by the Court of Chancery (b).

It is impossible within the limits of this work to enter even upon the subjects comprised within the Railway Clauses Act, the Lands Clauses Act, the Companies Clauses Consolidation Act, or the Acts regulating Joint Stock Banking Companies. All that can be [*396] done consistently with the present *object, in addition to what has been said, is, to give a general view of the Law of Contracts as applied by the general Act already referred to, and known as "The Companies Act, 1862."

By virtue of this Act, the principal Act, as amended by the other Companies Acts to which I have already referred (c), any number of persons not less than seven may, by using the modes prescribed by that statute, form themselves into an incorporated company, so as to obtain the advantages given them thereby. These

(a) *Tredwen v. Bourne*, 6 M. & W. 465; *Hawken v. Bourne*, 8 M. & W. 703.

(b) *In re the German Mining Co.*, 22 L. J. (Ch.) 926.

(c) *Ante*, p. *383.

modes are amongst other things the registration, in an office provided for that purpose, of a document called the memorandum of association, which memorandum is to declare the name of the company, its objects, capital, number of shares into which its capital is divided, the liability of its shareholders, whether limited or unlimited, and the part of the United Kingdom in which its registered office is to be established. The effect of this memorandum, when registered, binds the company and the shareholders in the same manner as a covenant to conform to all the regulations of the memorandum would bind them. It is clear, therefore, that the name of the company will thereafter be that which is declared in the memorandum of association until altered in a legal manner, and by this name only can it contract, so that the rights and liabilities provided by *statute shall attach to it by the contract. [*397] More precise regulations may also be made according to a form provided by the statute to accompany the memorandum of association, which are called articles of association. These also bind the shareholders and the company as if they had respectively covenanted to the same effect, and these, or such of them as are chosen by the company, being registered, and the registrar having certified that the company is incorporated, the shareholders become a body corporate by the name in the memorandum of association. But it must be remembered that if twenty persons or more after the 2nd of November, 1862, carry on in partnership any trade or business having gain for its object, unless so registered, or authorized by some other statute, or engaged in mining in the Stannaries, each of them may be sued for the whole debts of the co-partnership without joining any other member. As to contracts by companies which come within the prohibition

contained in 25 & 26 Vict., c. 89 (The Companies Act, 1862), s. 4, see *ante*, p. *292.

The objects for which the company is established, when once defined by the memorandum of association, cannot be departed from, and, therefore, a contract made by the directors of the company upon a matter not included in the memorandum of association is *ultra vires* of the directors and void, and cannot afterwards [*398] be ratified by the assent of *the whole body of the shareholders (*d*). It is indeed settled law that a statutory corporation created by Act of Parliament for a particular purpose is limited as to all its powers by the purposes of its incorporation as defined in the Act, and contracts in excess of those powers so limited are void (*e*). The doctrine of *ultra vires*, however, as thus explained, is to be applied reasonably, so that whatever is fairly incidental to those things which the legislature has authorized by an Act of Parliament, ought not (unless expressly prohibited) to be held as *ultra vires* (*f*). The cases illustrating this doctrine are very numerous, but to discuss them further would carry us beyond the limits of these Lectures, and I must therefore pass on with this brief notice of it (*g*).

Having, then, thus delineated the name by which a public company incorporated under the Act of 1862 may contract, and the sort of contracts which it may make, we come to consider the *manner in [*399] which it may make them. That Act gave no

(*d*) *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653; 44 L. J. (Ex.) 185, reversing *Riche v. Ashbury Railway Carriage and Iron Co.*, L. R. 9 Ex. 224; 43 L. J. (Ex.) 177.

(*e*) *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653, 693; 44 L. J. (Ex.) 185, 209; *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. C. 331.

(*f*) *Att.-Gen. v. Great Eastern Ry. Co.*, 5 App. Cas. 473; 49 L. J. (Ch.) 545.

(*g*) See on the subject of contracts *ultra vires* of companies, *Lindley on Partnership*, Bk. ii. c. 1. s. 2, pp. 249–253, 4th ed.; see, too, *Brice on Ultra Vires*.

form of contracting; but as companies registered under this Act are incorporated by sect. 18, the modes by which a corporation contracts were in general applicable to them (*h*). The powers, however, of companies registered under the Companies Act, 1862, as to the manner of contracting have been greatly enlarged by the Companies Act, 1867 (30 & 31 Vict., c. 131), s. 37, under which section contracts on behalf of any such company may be made as follows:—

“(1.) Any contract, which, if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the Company in writing under the common seal of the Company, and such contract may be in the same manner varied or discharged :

“(2.) Any contract, which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the Company in writing, signed by any person acting under the express or implied authority of the Company, and such contract may in the same manner be varied or discharged :

“(3.) Any contract, which, if made between [*400] *private persons, would by law be valid, although made by parol only, and not reduced into writing, may be made by parol on behalf of the Company by any person acting under the express or implied authority of the Company, and such contract may in the same way be varied or discharged.” The section concludes with declaring “that all contracts made according to the provisions

(*h*) See *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463, 4 C. P. 617 (Ex. Ch.); *S. C.*, 37 L. J. (C. P.) 211, 38 Ib. 338, *ante*, p. *377.

therein contained shall be effectual in law, and shall be binding upon the Company and their successors and all other parties thereto, their heirs, executors, or administrators, as the case may be."

By s. 55 of the principal Act, the company by instrument under their common seal, may empower any person as their attorney to execute deeds in their behalf anywhere out of the United Kingdom, and any deed so signed by the attorney on behalf of the company and under his seal shall be as binding as if under the company's seal.

By s. 47 of the same Act, bills of exchange and promissory notes shall be deemed to have been made, accepted, or endorsed on behalf of any company under this Act, if made, accepted, or endorsed, in the name of the company by any one acting under their express or implied authority, or if made, accepted, or endorsed by or on behalf of the company by any person acting under the authority of the company, and will be binding on them. Where a promissory note was made in this form: [*401] "Three *months after date we jointly promise to pay to F. G. or order £600 for value received in stock, on account of the London and Birmingham Iron and Hardware Company, Limited. Payable at the London Joint Stock Bank, Princes Street, Mansion House.—William Melrose, H. W. Wood, John Harris, Directors; Edwin Guest, Secretary,"—the Court considered that the note was made in the name of the company within the similar provisions of 19 & 20 Vict., c. 47, s. 43 (now repealed), and was therefore binding on the company, and not on the directors who signed it (i). Still, it must not be understood that either

(i) *Lindus v. Melrose*, 27 L. J. (Ex.) 326; 3 H. & N. 177. See *Smith v. Johnson*, *Ib.* 363; 3 H. & N. 222; *Penrose v. Martin*, 28 L. J. (Q. B.) 28; *Alexander v. Sizer*, L. R. 4 Ex. 102; 38 L. J. (Ex.) 59 (where J. S., the

by the above 47th sect. or elsewhere by the Act of 1862, is the power of accepting bills of exchange or issuing negotiable instruments given to companies as an incident of their incorporation under that Act. The Act leaves the power of a company so incorporated, with regard to negotiable securities, to be determined upon the proper construction of the memorandum and articles of association. There may, under the Act, be companies which *communicate to their directors [*402] the power to bind the shareholders by negotiable instruments. There may be companies which do not communicate any such power. If the power is to be given to the directors it must be given by the memorandum, and articles of association (*k*).

Preserving the forms thus required, a joint stock company may enter into any lawful contracts requisite to attain the objects for which it was established. Bearing in mind what has been said of the illegality of contracts *ultra vires* of the company, it will not probably be very difficult to determine whether any proposed contract is such as will bind the company with regard to the objects declared in the memorandum and articles of association. Upon such contracts the company thus incorporated may sue and be sued like any other corporation. If the company, on judgment being obtained against it, does not pay or satisfy the judgment, and execution issued thereon is unsatisfied in whole or part, the company shall be deemed unable to pay its debts (s. 80), and proceedings may then be taken for winding up

secretary of a railway company, was held not to be personally liable, on a note signed by him, "J. S., Secretary"); *Dutton v. Marsh*, L. R. 6 Q. B. 361 (in which case the directors were held personally liable as the makers of a note to which the company's seal was affixed).

(*k*) *Peruvian Railways Co. v. Thames and Mersey Ins. Co.*, per Lord Cairns, L. J., L. R. 2 Ch. App. 617, 623, 36 L. J. (Ch.) 864, 865. See also *ante*, p. *374.

the company, as it is called (s. 79). The result of these as to the liability of the existing shareholders is, that they shall upon the winding up be liable to contribute to the assets of the company, to an *amount [*403] sufficient to pay its debts, and the costs, charges, and expenses of winding it up; but if the company is limited, each shareholder will be liable to contribute to the assets of the company to the amount, if any, which may remain unpaid on the shares held or the amount guaranteed by him (ss. 38, 90, 134). Moreover, no person who has ceased to be a shareholder for the period of one year prior to the commencement of the winding up, shall be liable to contribute to those assets, nor shall any past member be liable in respect of any debts of the company contracted since he ceased to be a shareholder (s. 38). But if the company being wound up be limited, no past or present member can be made to contribute more than the amount unpaid on his share, or the amount he has guaranteed; nor, whether the company be limited or not, shall any past member be liable to contribute, unless the existing members are unable to satisfy the contributions required. The liability of any person to contribute to the assets of a company registered under the Act, in the event of its being wound up, is to be deemed to create a debt of the nature of a specialty accruing due from such person at the time when his liability commenced, but payable at the times when calls shall be made for enforcing such liability (s. 75).

As to the rights of shareholders against the company, every person who has accepted any share in a company registered under this Act, and whose *name is [*404] entered in the register of members, shall for the purposes of this Act be deemed a member. The transfer of any share may be in a form provided by the

Act, and to be executed by transferor and transferee; but the transferor shall be deemed to remain a holder of his share until the name of the transferee is entered on the register, and the title of every shareholder to his shares shall be a certificate under the common seal of the company specifying the shares held by him. Finally, the amount of calls for the time being unpaid on his shares shall be deemed a debt due from the shareholder to the company (ss. 23, 31, Table A.) (*l*).

I have now specified the various classes of parties with regard to whose competency to enter into contracts I had any particular observations to make; and now, assuming that none of the various cases of disability which I have mentioned arises, but that the parties entering into the contract are competent by law to do so, there remains one other *very important subject to advert to, namely, the mode in which they may [*405] become parties to the contract. And this must be in one of two ways; either personally or by the intervention of an agent.

There are few branches, perhaps no branch, of the law of England, to which it becomes so often necessary to refer, as that which regulates the rights of parties under contracts made by agents. The truth is, that, as society is now constituted, the business of life has become so complicated, that “no man’s individual efforts can embrace all the subjects with which he is called on to deal.” Hence we are obliged to transact a variety of business and enter into a variety of engagements through

(*l*) It seems undesirable to introduce more fully the subject of the law of joint-stock companies within the limits of this work. For further information on that subject reference may be made to the chapter on Joint Stock Companies in the 9th edition of Smith’s Mercantile Law, by Mr. Dowdeswell, where the statutes are abridged and the leading decisions arranged with singular fulness, clearness, and brevity. The student will also find great advantage in consulting on this subject the last edition of Lindley on Partnership.

the medium of agents, the precise effect of whose acts in binding or advantaging us becomes of course a matter of the utmost practical importance. I cannot, however, attempt, in the time which remains to me for that purpose, to do more than state the general principles by which the subject (so far as relates to contracts) is regulated.

Generally speaking, whatever contract a man may enter into in his own person, he may, if he think fit, appoint an agent to enter into in his behalf. There are, indeed, one or two exceptions to this rule, which arise out of the wording of certain Acts of Parliament, requiring the intervention of the principal party himself in certain contracts. For instance, a man could not [*406] appoint an agent to *sign a writing for the purpose of exempting a case from the operation of the Statute of Limitations, as 9 Geo. IV., c. 14, s. 1, required the writing to be signed by the party chargeable thereby (*m*). Now, however, by 19 & 20 Vict., c. 97 (Mercantile Law Amendment Act, 1856), s. 13, the signature of a duly authorized agent is sufficient in that case. Nor can a person who objects to the name of another being retained upon the list of voters in a parliamentary borough empower an agent to sign the objection for him (*n*), as 6 & 7 Vict., c. 18, s. 100, requires every notice of objection to be signed by the person objecting. But it seems that, unless strictly required to be signed by the principal, it is sufficient if a contract required to be in writing, be signed by an authorized agent (*o*).

(*m*) *Hyde v. Johnson*, 2 Bing. N. C. (29 E. C. L. R.) 176; *Ley v. Peter*, 27 L. J. (Ex.) 239; 3 H. & N. 101.

(*n*) *Toms, app., Cuming, resp.*, 7 M. & Gr. (49 E. C. L. R.) 88. See *Davies v. Hopkins*, 27 L. J. (C. P.) 6; 3 C. B. (N. S.) (91 E. C. L. R.) 376.

(*o*) *Morton v. Copeland*, 24 L. J. (C. P.) 169; 16 C. B. (81 E. C. L. R.) 517.

But, generally speaking, whatever contract a man may lawfully enter into himself, he may appoint an agent to enter into for him. There is, however, another extensive and important exception to this rule, which takes place when a man is himself an agent (*p*). He cannot, in this instance, appoint an agent to transact the matters entrusted to his own *agency. The exception evidently arises from the very nature [*407] of his own appointment; for it is one thing to trust a man's discretion to transact your affairs and for which you may know him to be quite competent, but altogether another and a different thing to trust his discretion to select a stranger to transact your affairs at your responsibility. The maxims of law, therefore, are—“*Delegatus non potest delegare*,” and “*Vicarius non habet vicarium*”—maxims which, it is obvious, are necessary for the principal's protection, but which, it is clear, cannot apply where you give your agent power to appoint a deputy either expressly (*q*), or by implication. For such a power may be implied, either from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency; or again, where in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of appointing a substitute (*r*).

Now the considerations on which I shall have occasion to touch, relate to *one of four points* into which what I have to say on this subject may be

(*p*) *Combe's case*, 9 Co. 76 b.; *Cobb v. Becke*, 6 Q. B. (51 E. C. L. R.) 930; *Cockran v. Islam*, 2 M. & Selw. 301, n.

(*q*) *Moon v. Whitney Union*, 3 Bing. N. C. (32 E. C. L. R.) 817; *Lord v. Hall*, 8 C. B. (65 E. C. L. R.) 627.

(*r*) See the judgment of the Court of Appeal (delivered by *Thesiger*, L. J.) in *De Bussche v. Alt*, 8 Ch. Div. at pp. 310, 311; 47 L. J. (Ch.) pp. 386, 387.

[*408] *conveniently enough distributed; and they relate to the questions—

1. *Who may be an agent.*
2. *How an agent is appointed.*
3. *How far his contracts bind his principal.*
4. *How far the principal may be advantaged by them.*

Now, with regard to the *first* point, namely, *who* is competent to be an agent, I have to observe, that it by no means follows that a person who is not competent to contract himself is therefore not competent to contract as agent for another person; thus it has been decided that an infant may be an agent, or even a married woman, though she could not have contracted in her own right. Thus, where a married woman kept a school, at which the defendant had placed his daughter, and drew upon him a bill for the expenses of the daughter's education, which bill, after he had accepted it, she endorsed to the plaintiffs, and the drawing and endorsing of the bill were both in the wife's name, but with the husband's assent, who also obtained the value of the bill from the plaintiffs, it was considered that there was ample evidence of the husband having authorized the drawing and endorsing of the bill, and that there was nothing to prevent his making his wife his agent for that purpose. The defendant therefore as acceptor, [*409] *was liable to the plaintiffs as endorsees (s). In a very similar case, where a wife accepted in her own name a bill drawn upon her husband, and his authority was proved, he was held liable. To the ob-

(s) *Prestwick v. Marshall*, 7 Bing. (20 E. C. L. R.) 565; *Prince v. Brunatte*, 1 Bing. N. C. (27 E. C. L. R.) 435. See *Lord v. Hall*, 8 C. B. (65 E. C. L. R.) 627.

jection that a drawee cannot bind himself otherwise than by writing his own name on the bill, which you are no doubt aware is the general practice in accepting bills, it was asked, would he not be liable if, with his own hand, he had accepted the bill by writing another's name across? The only difference was, that he had done so by the hand of his wife. Had he done it with his own hand, it clearly would have been his own acceptance, and the Court held that there was no rule of law which made such an authority void. Nobody but the defendant could have accepted the bill so as to bind, and he accepted it by the hand and in the name of his wife (*t*). It will be obvious that the general reason why persons incapacitated to contract may, notwithstanding their incapacity, act as agents in the contracts of others, is, that their incapacity is personal, and that such contracts are not their own, but the contracts of those whose agents they are.

But it is held that, upon the peculiar wording of the Statute of Frauds, one of two parties entering into a contract, such as we have seen *that Act re- [*410] quires should be in writing and signed by the party to be charged thereby, cannot be agent for the other, even with that other's consent, so as to bind him by his signature to such a writing (*u*). Thus, where the plaintiff, an auctioneer, sued the defendant for not paying for goods purchased by him, and, the goods not having been delivered, the only evidence of the contract was the book kept by the plaintiff as an auctioneer, in which he had duly entered the different biddings opposite the lots; the Court of King's Bench held

(*t*) *Lindus v. Bradwell*, 5 C. B. (57 E. C. L. R.) 583.

(*u*) *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 B. & Ald. (7 E. C. L. R.) 333; *Sharman v. Brandt*, L. R. 6 Q. B. 720; 40 L. J. (Q. B.) 312.

that, although in general an auctioneer may be considered as the agent and witness of both parties (the vendor and the purchaser), yet when he elects, as he may do, to sue himself as one of the contracting parties, the agent who is to bind a defendant by his signature must be some third person, and not the other contracting party upon the record (*x*). To allow it, indeed, would seem to amount to a direct dispensation with the signature of the party to be bound, which, whether by [*411] his own or his *agent's hand, the statute requires. But it seems to be no violation of the requirement,—the hand of the agent or principal,—that the *agent* of the one party should act as the agent of the other, although, of course, in such a case clear evidence would be required to show his authority, constituting him the agent of the latter. Thus, in an action by an auctioneer against a purchaser of goods sold by auction, the entry in the auctioneer's sale-book, made by the auctioneer's clerk who was assisting at the sale, and as each lot was knocked down named the purchaser aloud, and on assent from him made an entry of the sale to him, was held a sufficient memorandum within the 17th section of the Statute of Frauds; the clerk being, in the first instance, the agent of the auctioneer, and constituted the agent of the purchaser by the assent of the latter, when told by the clerk that the lot was knocked down to him (*y*). But where the traveller of a wholesale dealer, calling on a shopkeeper to sell his principal's goods, and having by parol sold him certain sugar, was desired by the latter to make,

(*x*) *Farebrother v. Simmons*, *supra*. An auctioneer, however, is only the agent of both vendor and purchaser at the sale; when the sale is over the rule does not apply. His signature therefore, on a subsequent sale of unsold lots left over, would not bind either party in the absence of evidence of subsequent authority. *Mews v. Carr*, 1 H. & N. 484; 26 L. J. (Ex.) 39.

(*y*) *Bird v. Boulter*, 4 B. & Ad. (24 E. C. L. R.) 443.

in his (the shopkeeper's) book, a memorandum of the transaction, and thereupon made the following—"Of North & Co., 30 mats maurs, at 71s.,—cash 2 months,—Fenning's Wharf," and signed it with his own name; the sugar having been destroyed before it was delivered, it became *necessary to prove the sale by a [*412] written memorandum; but these facts were held insufficient to show that the traveller was constituted the agent of the shopkeeper to bind him under the statute (z). Indeed, it seems clear, as observed in the case, that the signing of the entry in the defendant's book would tend to make it obligatory on the plaintiff, the vendor, rather than on the defendant, the shopkeeper.

With regard to the second point, namely, in what manner an agent is to be appointed:—Whenever there is no particular rule of law or special statutory provision pointing out a particular mode of appointment, he may be appointed even by bare words. But there are some cases in which the Common or Statute Law *does* require a particular mode of appointment; for instance it is a rule of Common Law, that an agent who is to contract for his principal by deed, must himself be appointed by deed (a).¹

(z) *Graham v. Musson*, 5 Bing. N. C. (35 E. C. L. R.) 603; *Graham v. Fretwell*, 3 M. & Gr. (42 E. C. L. R.) 368; *Mews v. Carr*, 26 L. J. (Ex.) 39; 1 H. & N. 484.

(a) *Harrison v. Jackson*, 7 T. R. 209.

¹ *M'Murty v. Frank*, 4 Mon. 39; *Cummings v. Cassily*, 5 B. Mon. 74; *Boyd v. Dodson*, 5 Humph. 37; *Bragg v. Fessenden*, 11 Ill. 544; *Damon v. Granby*, 2 Pick. 352; *Blood v. Goodrich*, 12 Wend. 525; *Wells v. Evans*, 20 Ib. 251; *Rhode v. Louthain*, 8 Blackf. 413. Perhaps the most important as well as frequently recurring cases to which this common law rule applies, are those of contracts under seal made by one member of a partnership without authority under seal from the other.—R.

Where a man's wife signed his name to a deed and sealed it, and he subse-

Again, a corporation, as it can, generally speaking, do no act except by deed; so it cannot, generally speaking, appoint an agent in any other way. There are, indeed, one or two exceptions to this, as you have seen there are to the rule which obliges them to contract by deed, particularly in the cases of *trading companies. You will find the rule and the exceptions discussed in *Dunston v. Imperial Gas Light Company* (b). With regard to the case of a statute requiring a particular mode of appointment, you may take, for example, the Statute of Frauds, the 1st, 2nd, and 3rd sections of which require, in express terms, that the agent who is to do any of the acts mentioned in those sections shall be appointed by writing, whereas the 4th and 17th sections contain no such provision. The consequence, of course, is, that in cases within these latter sections the agent's authority need not be in writing (c).

With regard to the third point, namely, in what cases the principal is bound by his agent's contract:—It is, of course, obvious, at first sight, that, so far as the agent's authority extends, his principal is bound by all acts done in pursuance of that authority.¹ So far there

(b) 3 B. & Ad. (23 E. C. L. R.) 125.

(c) *Emmerson v. Heelis*, 2 Taunt. 46.

quently acknowledged the deed before a magistrate, it was held that this was a ratification and adoption of the deed which bound him: *Bartlett v. Drake*, 100 Mass. 174. And in a subsequent case in the same court Gray, C. J., said, "The law is settled in this commonwealth that the unauthorized execution of a deed in the name either of a partnership or of an individual may be ratified by parol:" *Holbrook v. Chamberlin*, 116 Ib. 161. *Sed contra*: *Stetson v. Patton*, 2 Greenl. 358; *Despatch Line v. Man. Co.*, 12 N. H. 205; see *Blood v. Goodrich*, 9 Wend. 77.

¹ Every one who deals with an agent is bound, at his peril, to ascertain the extent of his authority: *Powell v. Henry*, 27 Ala. 612. The authority of a general agent to contract so as to bind his principal is only limited to the usual and ordinary means of accomplishing the business entrusted to him: *Williams v. Getty*, 31 Pa. St. 461; *McAlpin v. Cassidy*, 17 Tex. 462.—s.

can be no doubt or difficulty whatever. But the cases in which doubts and difficulties arise, are those in which the agent has gone beyond his authority—has made some contract which his instructions do not authorize; and then the question arises whether his principal shall or shall not be bound by it. Now, in order to solve this question, it is necessary, in the first instance, to understand the distinction between *general* and *particular* agency. A general agent is an agent entrusted with all his principal's *business in some specific line, of some specific kind. A particular agent [*414] is an agent employed specially for some one special purpose. For instance, if I entrust another with the sale of a particular horse, of which I am desirous of disposing, he is a *particular* agent to transact that particular business (*d*). But if I appoint an agent to sell all my horses, and consign horses to him from time to time for sale, he is my *general* agent in that line of business. Now, there is this important distinction between contracts made by general, and those made by particular, agents—namely, that if a particular agent exceed his authority, his principal is not bound by what he does;¹

(*d*) *Brady v. Tod*, 30 L. J. (C. P.) 223; 9 C. B. (N. S.) (99 E. C. L. R.) 592.

¹ Thus, in *Batty v. Carswell*, 2 Johns. 48, where one who was authorized to sign a note for another for \$250, payable in six months, signed one payable in sixty days, it was held that the principal was not liable, because the authority, which was a special one, was not strictly pursued. So, a clerk in a retail store has no authority to sell by wholesale, or to deliver goods in payment of or security for debts: *Beals v. Allen*, 18 Johns. 362; *Hampton v. Matthews*, 14 Pa. St. 107. So, a clerk employed to do outdoor business of a merchant, such as to negotiate purchases and charter-parties, present bills of lading for signature, &c., has no authority to pledge these bills of lading, or receive advances on them: *Zachrisson v. Ahman*, 2 Sandf. 68. So, one employed by a merchant to purchase goods, give notes, and do all other things in his business as merchant will not be authorized to mortgage goods in the merchant's store: *Reeves v. Baldwin*, 1 Smith, 170. So, one having

whereas, if a general agent exceed his authority, his principal is bound, provided what he does is within the ordinary and usual scope of the business he is deputed to transact. For instance, if I employ A. to carry a bale of cottons from Manchester to Liverpool, and he sells them, I am not bound by the sale, but may bring an action of trover for them against the purchaser; whereas, had I entrusted them to my factor for the same purpose, I should have been bound by the sale, that being a transaction within the ordinary scope of his business as factor (e).¹

(e) See *Fenn v. Harrison*, 3 T. R. 757; 4 T. R. 177.

authority to collect a note, has none to take a sealed note for the amount, and there will be no merger of the original debt: *McCulloch v. McKee*, 16 Pa. St. 289. So, if a shopman authorized to receive money over the counter only receives it elsewhere than in the shop, the payment is not good: *Kaye v. Brett*, 5 Exch. 273. Other instances of the application of this familiar rule may be found in *Andrews v. Kneeland*, 6 Cow. 354; *Thompson v. Stewart*, 3 Conn. 171; *Snow v. Perry*, 9 Pick. 542; *Lobdell v. Baker*, 1 Metc. 201; *Huntington v. Wilder*, 6 Vt. 234; *Brown v. Billings*, 22 Ib. 98; *Gordon v. Buchanan*, 5 Yerg. 71; *Bank of Hamburg v. Johnson*, 3 Rich. 42; *Carter v. Taylor*, 6 Sm. & M. 367; *Shriver v. Stevens*, 12 Pa. St. 258; *Scott v. McGrath*, 7 Barb. 53; *Paige v. Stone*, 10 Metc. 160.—R.

Taylor v. Labeaume, 14 Mo. 572; *Nash v. Drew*, 5 Cush. 422; *The Methuen Co. v. Hayes*, 33 Me. 169; *Bailey v. Rawley*, 1 Swan, 295; *Kirk v. Hiatt*, 2 Ind. 322; *Towle v. Leavitt*, 23 N. H. 360; *Huber v. Zimmerman*, 21 Ala. 488. An agent employed to buy and sell has no authority to bind his principal by a negotiable note given for notes bought: *Temple v. Pomroy*, 4 Gray, 128.—S.

¹ A factor is a general, not a special agent, entrusted with the possession disposal, and apparent ownership of property; and having a general power to sell, he may do so for cash or on credit, and receive in payment notes or any kind of property. Notwithstanding this general authority, it was, however, held in England, in the case of *Paterson v. Tash*, 2 Str. 1178, that "a factor cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there may be the formality of a bill of parcels and a receipt," and this decision has been followed, though with occasional reluctance, by numerous cases: *Daubigny v. Duval*, 5 T. R. 604; *Martini v. Coles*, 1 M. & S. 140, 493; *Graham v. Dyster*, 6 Ib. 1, 14; *Queiroz v. Trueman*, 3 B. & C. (10 E. C. L. R.) 342; *Fielding v. Kymer*, 2 Brod. & Bing. (6 E. C. L. R.) 639. Such is recognized as the rule on this side of the Atlantic, unless where it has been altered by statute: *Van Amringe v. Peabody*, 1 Mas. 440; *Kinder v. Shaw*,

*The case of *Whitehead v. Tuckett* (*f*) is a very good illustration of the rule, that, although the express instructions are exceeded, yet, if what he does is within the usual scope of the business he is deputed to transact, the agent binds his principal by so doing. There, Sill & Co., who were brokers at Liverpool, were employed by the defendant, a wholesale grocer at Bristol, to buy and sell on his account great quantities of sugar. The greater part was bought on speculation for resale, and was resold at Liverpool; but some was occasionally sent to the defendant. Sill & Co. usually bought and paid for the sugar, and re-sold in their own names and received the price. They did not draw upon the defendant for the amount of each purchase, nor remit him the bill in payment of each sale; but there was a general running account between them. Sill & Co. never had a general authority to buy, but received directions in each instance; but sometimes, when the markets were low, had unlimited authority as to the quantity they were to buy, or the price they were to pay. In like manner, they had no gen-

(*f*) 15 East, 400. See *In re Athenæum Life Ass. Co.*, 27 L. J. (Ch.) 829.

2 Mass. 398; *Odiorne v. Maxcy*, 13 Ib. 178; *Hoffman v. Noble*, 6 Metc. 74; *Holton v. Smith*, 7 N. H. 446; *Newbold v. Wright*, 4 Rawle, 195; *Kennedy v. Strong*, 14 Johns. 128; *Hewes v. Doddridge*, 1 Robinson (Va.) 143. It has, however, been held that although a factor has not authority to pledge, yet he can in the usual course of mercantile dealing, deliver for sale to a broker, auctioneer, &c., the goods entrusted to him, and receive money upon them as an advance, and the deposit will bind the principal, who cannot recover them in trover: *Martini v. Coles*, *supra*; *Laussatt v. Lippincott*, 6 S. & R. 386; *Martin v. Moulton*, 8 N. H. 504; *Bowie v. Napier*, 1 McCord, 1. But the rule thus established by *Paterson v. Tash*, having been thought to impose undue restrictions upon the facilities of commercial dealings, has been altered by the acts of Parliament referred to by the English editor, *supra*, which have been copied with more or less exactness in New York, Pennsylvania, Rhode Island, Ohio, Massachusetts, and some other States. See the note to *Laussatt v. Lippincott*, in 1 Am. L. C. 668.—R.

eral authority to sell, but received directions on each occasion. It was held that they might bind their principal by a re-sale of a particular parcel of sugar before purchased and paid for in their own names and lodged [*416] in their own warehouse, *though such re-sale was for a price less than they were directed by their principals to sell for; for the Court considered that the general authority of the broker to sell being, in respect of those who did not know their private instructions, *to be collected from their general dealing*, was not limited by such private instructions. So, where the real principal in a business holds out an agent as the ostensible principal, and carries it on under his management and in his name, he is bound by all such acts and contracts as are incidental to the ordinary conduct of the business, and this obligation cannot be restricted by any private arrangement between them (*g*). On the other hand, the following case illustrates the rule as to the particular agent. The defendant, being about to purchase a mare, wrote to the plaintiff, "I will take the mare at twenty guineas, of course warranted;" and subsequently wrote again, "My son will be at the World's End (a public-house) on Monday, when he will take the mare and pay you: send anybody with receipt and money shall be paid, only say in the receipt sound and quiet in harness." The plaintiff wrote in reply, "She is warranted sound, and quiet in double harness;" and the mare, having been brought to the World's End on Monday, was taken away by the defendant's son without paying the price, and without [*417] a receipt or *warranty. The defendant kept her two days, and then returned her as being unsound. The writings between the parties not amounting to a complete contract, it was sought to show that

(*g*) *Edmunds v. Bushell*, L. R. 1 Q. B. 97; 35 L. J. (Q. B.) 20.

the defendant was bound by the conduct of his son, as amounting to an acceptance in law. But it will clearly be perceived that the son was a particular agent, in which case his principal is not bound by what he does if he exceeds his authority. "The son," said *Parke*, B., "had only a limited authority; and if a party contracts with another through his agent, he can only take such rights as the agent can give: and this is no hardship on the plaintiff, because he was distinctly informed that the son was authorized to receive the mare if a warranty were given that she was quiet in harness." This was not given, and, therefore, the son had no authority to accept the mare, and the defendant was not bound by the son's act (*h*).

Now the reason for this distinction between the case of a general and particular agent is very clear and simple: it is, that the public may not be deceived. If strangers see A. selling my goods day after day, month after month, and see me recognizing the transactions, and receiving payment on that understanding, they may naturally enough suppose that I have given him a general authority to sell, and that they may safely deal with him on *my account; and it would be [*418] hard indeed if I were allowed to turn round upon them and say, "True, he has a general authority, but I had revoked it in this particular instance." But, in the case of a particular agent, it is otherwise; for, as he is employed on one particular occasion only, there are no previous acts done by him for his principal, or recognitions of them by the principal, which can have a tendency to mislead any one. And there is no hardship in saying to the person who deals with him, "You must satisfy yourself that he is my agent at all, and when you do so you may as well satisfy yourself

(*h*) *Jordan v. Norton*, 4 M. & W. 155, 162.

for what purposes he is my agent, and how far his authority extends.”¹

Such then is the distinction between a particular and a general agent; and with regard to the latter, there is, for the further protection of the public, this further rule, *that the authority of a general agent is, as far as the public are concerned, measured by the extent of his usual employment.* This is also a rule of common sense as well as law; for what I see a man continually doing with the approbation of another, I may fairly conclude he has a general authority to do. I have not, it is true, seen his instructions, but I am justified in believing that he acts according to them when I see that his principal does not signify disapprobation of his proceedings; and therefore the rule is, that where a man permits another to act generally for him in any line of business, he is bound by contracts made *by [*419] that other in that line of business; although, in truth and in fact, the person so acting may have a limited authority, or even no authority at all. This is laid down by Lord *Holt*, in homely, but forcible language, in *Shower*, 95, where it is thus reported:—

“*Memorandum.*—Upon evidence in an assumpsit for wares sold, it is held by *Holt*, C. J., that if a man send his servant with ready money to buy meat or other goods, and the servant buys upon credit, the master is not chargeable.² But if the servant usually buy upon

¹ *Snow v. Perry*, 9 Pick. 542; *Fisher v. Campbell*, 9 Port. 210; *Johnson v. Wingate*, 29 Me. 404; *Hatch v. Taylor*, 10 N. H. 538.—R.

² *Boston Iron Co. v. Hale*, 8 N. H. 363. Otherwise, of course, if the servant or agent be ordered to buy, and be not furnished with money: *Sprague v. Gillett*, 9 Metc. 91.—R.

When the authority of an agent is in question as to a certain sale, evidence of similar sales made subsequently under different circumstances is not admissible to show ratification of the first sale, such facts being collateral, and not affording a reasonable inference as to the matter in dispute: *Lee v. Tinges*, 7 Md. 215 —s.

tick, and the servant buy some things without the master's order, yet, if the master were trusted by the trader, the master is chargeable."

There is a case of *Rusby v. Scarlett* (i), which affords a good illustration of this. The plaintiff was a corn-chandler, who sued the defendant for the price of hay and straw sold for the use of the defendant's horses. He had delivered it at the defendant's stables, and also bills of parcels, but had never seen the defendant or received any order from him, or any payment whatever directly from him. The defence was that the defendant had given his coachman money to pay the bills, which he had embezzled. The defendant kept a book with his coachman, in which were entered the articles procured by him, and money from time to *time [*420] advanced to him; but there did not appear to be any connection between the sums advanced to the servant, and the demands which he was to pay; but the money was advanced generally. "If," said Lord *Ellenborough* to the jury, "the servant was always in cash beforehand to pay for the goods, the master is not liable, as he never authorized him to pledge his credit. But, if the servant was not so in cash, he gave him a right to take up the goods on credit: and I think he would be liable, as the servant has not paid the plaintiff, though he might have received the money from the defendant, his master." Upon the law thus laid down, the jury found a verdict for the plaintiff. "Suppose," said Lord *Denman*, C. J., in another case, "a landed proprietor had to send his steward habitually to the neighbouring fairs and markets to make sales and purchases for him in matters connected with the management of his estate; that the steward makes all these contracts in his own name, but that he is universally

(i) 5 Esp. 76.

known to have no land of his own, and to be acting solely for his employer, by his direction and on his credit. Could his intention to make himself the owner of articles bought on one particular occasion in the course of the same dealing, deprive the vendor of his recourse against the master? Clearly not." In this instance every one would naturally suppose that the proprietor who authorized him to purchase in numerous [*421] cases, authorized him to purchase in *that case also, in which he appropriated the thing purchased to himself, and the proprietor could not in common reason and justice be allowed to say to a person dealing innocently, that he did not authorize him in that instance (*k*). In the case (*l*) from which these observations are taken, the defendant, who was a merchant at St. Petersburg, had for a long time carried on business in London through one Higginbotham, in all the transactions of which business Higginbotham always used his own name, but was universally known to represent the defendant in them. He had himself neither capital nor credit. The defendant put an end to the agency; and afterwards Higginbotham made the contract (a sale of tallow) on which the action was brought, in all respects as if it had been in the defendant's business, in his own name as usual, and notwithstanding the termination of his agency; and the defendant was quite ignorant of the transaction. These were substantially the facts in the case. The defendant was held bound to deliver the tallow. A motion for a new trial, on the ground that the sale was made by Higginbotham on his own account, was refused, on the ground that he was trading in his own name as the defendant's agent, with the defendant's full knowledge

(*k*) *Trueman v. Loder*, 11 A. & E. (39 E. C. L. R.) 593.

(*l*) *Ib.* 589.

and authority; and that till the defendant *gave notice to the world that he revoked Higginbotham's power to act for him, all persons had a right to hold him to the contracts made by Higginbotham. "In a word," said the Court, "it was considered that the defendant was carrying on his business in the name of Higginbotham."

The case of *Pickering v. Busk* (*m*) is in accordance with the same rule. There a broker in London, engaged in the hemp trade, purchased for the plaintiff, a merchant at Hull, a parcel of hemp then lying at a wharf in the vendor's name, and the hemp was, by the plaintiff's desire, transferred in the wharfinger's books from the vendor's name to the broker's, and paid for by the plaintiff. The broker, while the hemp was remaining there in his name, contracted for the sale of hemp on his own account to H. & Co., and having none of his own to deliver, transferred the plaintiff's hemp to H. & Co., and received the money. In this case the question was, whether the broker had authority to sell—it is clear that, as between himself and the plaintiff, his principal, he had it not; and the only question was, whether the latter, by permitting the broker to act as he had done in the purchase and transfer of the hemp, was bound by his contract with respect to it, made with a person who knew nothing of the broker's real authority. The Court considered that the broker in this case was *a general seller of hemp; that the hemp in question was left in the custody of the wharfinger in the broker's name; and that no stranger could suppose that it would be so left in the broker's name, but in order that the broker might dispose of it in his ordinary business as a broker: and they determined, that, the latter having sold the hemp, the principal was bound.

(*m*) 15 East, 38.

The same principle is illustrated by cases relating to the liability of the provisional committeemen, or the directors, or the chairman, of a proposed company for the contracts of other committeemen, &c., or the secretary. Where they give each other, or the secretary, or an original promoter, apparently the power to bind them, they will be liable upon contracts made by him in their names, although they expressly prohibit him so to do; or, though there may be a private arrangement between them, that he, and not they, are to be liable. Provisional directors of a projected joint stock company, who were induced to become such by the representations of the nominal secretary (the getter up of the company), that he would pay the preliminary expenses, and that they should not be liable, passed a resolution *inter alia* that the company should be advertised. The secretary agreed with the plaintiff for advertising the company, showing him the resolution of the directors, but not informing him of the above [*424] understanding with the directors. *The latter were held liable to the plaintiff for the advertisements (*n*).

There is a series of instances, showing, that where a man appoints another to act for him in any line of business, he is bound by contracts made by him according to usage therein, which instances, although they consist of disputes between the principal and agent, and not like those we have been considering between the principal and the party with whom the agent has contracted, throw a great deal of light upon the obligation of the principal derived from the ordinary mode of transacting business, and in that point of view it will

(*n*) *Maddick v. Marshall*, 16 C. B. (N. S.) (111 E. C. L. R.) 387; 17 C. B. (N. S.) (112 E. C. L. R.), Ex. Ch., 829; *Riley v. Packington*, L. R. 2 C. P. 536; 36 L. J. (C. P.) 204.

be useful to mention some of them here. The first of these instances is that of *Sutton v. Tatham* (o), where a person employed a broker to sell 250 shares in the South Australian Company; he was in an error as to the number; he meant to say 50 shares, and in reality he had no more. The broker contracted with another broker on the Stock Exchange for the sale. The shareholder on the next day informed his broker of the mistake, and, finding the bargain could not be made void, requested him to do the *best he could. By the [*425] rules of the Stock Exchange, in sales of this description, if the vendor is not prepared to complete his contract, the purchaser buys the requisite number of shares, and the vendor's broker is bound to make up the loss, if any, resulting from a difference in prices. Accordingly, the vendor being unable to complete his contract, and the purchaser having bought the requisite number of shares at a loss, the broker paid the difference, and was held by the Court of Queen's Bench entitled to recover that difference from his principal the shareholder. "For," said Mr. Justice *Littledale*, "a person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed." "I consider it to be clear law," said Mr. Baron *Parke*, in the subsequent case of *Bayliffe v. Butterworth* (p), "that if there is at a particular place an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there, has an implied authority to act in the usual way; and if it

(o) 10 A. & E. (37 E. C. L. R.) 27. See *Hayworth v. Knight*, 33 L. J. (C. P.) 298; *Robinson v. Mollett*, L. R. 7 H. L. 802, 44 I. J. (C. P.) 362, reversing *Mollett v. Robinson*, L. R. 5 C. P. 646; 7 C. P. 84, 39 L. J. (C. P.) 290; 41 Ib. 65.

(p) 1 Exch. 428.

be the usage that he should make the contract in his own name, he has authority to do so. It appears to me, that a person who authorizes another to contract for him, authorizes him to make that contract in the usual way."

[*426] Thus it *has been held, that one who employs a broker to buy railway shares for him, authorizes him by that employment to do all that is needful to complete the bargain (*q*); and, therefore, where the defendant employed a broker and member of the Stock Exchange to buy some shares for him in the Vale of Neath Railway at 30s. discount, and at the time of the purchase a call had been made but was not payable, and the seller of the shares, in order to enable him, the seller, to transfer them, paid the call, which the defendant refused to allow; and the broker, being responsible by the rules of the Exchange for the completion of the contract, paid it; the broker was allowed to recover the money so paid from the defendant, the purchaser of the shares. The meaning of this contract clearly was, that the purchaser should become the owner of the shares upon payment of all such sums which the prior holders might have paid or become liable to pay in respect of them, less 30s. The authority, therefore, given to the plaintiff, enabled him to buy the shares, and to incur a liability to pay all that had been paid upon them and that they then stood charged with, less 30s.

But although, if a person employs a broker to transact business for him upon a market with the usages of which he, the principal, is unacquainted, he gives authority to the broker to make contracts *upon
[*427] the footing of such usages, provided they are such as regulate the mode of performing the contracts and do not change their intrinsic character, yet if on

(*q*) Bayley v. Wilkins, 7 C. B. (62 E. C. L. R.) 886.

the other hand the custom or usage is of such a character as to be completely at variance with the relation between the broker and principal, it is not binding on the principal, who is ignorant of the usage (*r*).¹

Again, the power of the master of a ship to bind his owners being but a branch of the general law of agency, it is clear that when a master contracts as such in a foreign port to carry goods for a foreigner, his authority to bind his owner is that conferred by the law of the country to which his ship belongs; and the flag of his ship is notice to all the world that his implied authority is limited by the law of that flag (*s*). Where a defendant carried on the business of horsedealer, and S., who assisted him in his business, and was also himself a horsedealer, sold for him a horse to the plaintiff, and warranted him to be sound, it was held that, it being within the scope of a horsedealer's business to give a

(*r*) *Robinson v. Mollett*, L. R. 7 H. L. 802, 44 L. J. (C. P.) 362, reversing *Mollett v. Robinson*, L. R. 5 C. P. 646; *Ib.* 7 C. P. 84; *S. C.* 39 L. J. (C. P.) 290; 41 *Ib.* 65.

(*s*) *Lloyd v. Guibert*, 33 L. J. (Q. B.) 241; 35 *Ib.* 74; L. R. 1 Q. B. 115 (*Ex. Ch.*)

¹ In order that a rule or custom should be binding upon a principal who had no notice of it, it has been held that it must be *reasonable*. Thus in *Evans v. Wain*, 71 Pa. St. 75, Williams, J., said: "Such a custom, if proved, would have constituted no defence to the plaintiff's action. If there is a custom among stockbrokers," he continued, "when dealing with others, to appropriate money belonging to the principal to the payment of his broker's indebtedness, the sooner it is abolished the better; *Malus usus est abolendus*. A custom so iniquitous can never obtain the force or sanction of law." In *Day v. Holmes*, 103 Mass. 309, Morton, J., said: "The usage alleged by the plaintiffs to exist among stockbrokers in Boston cannot avail them. There are many forcible objections to it; but a conclusive one is, that it is against sound policy and good morals. It authorizes the broker in his discretion to disregard his instructions, and, instead of acting solely in the interest of his principal, to speculate upon the transaction for his own benefit. It creates in the agent an interest adverse to his principal, and is inconsistent with his duty and the obligations which the law imposes upon him when he enters into the contract of agency. Such a usage, unknown to the principal, cannot be supported." See also *Tomkins v. Saffery*, L. R. 3 App. Cas. 213; *Shaw v. Spencer*, 100 Mass. 382.

warranty whenever the giving of a warranty may form part of the transaction, no *evidence was admissible to show that the defendant forbade S. to warrant (*t*).

Of course the principal would not be bound by any rule or custom of trade made after the transaction was completed, however it might bind the agent (*u*); and it will appear equally clear that if he deviates from the course usual in the line of business in which he is employed, he not only has no authority in fact, but does not seem to have any, and consequently, cannot bind his principal thereby. Thus, although the master of a ship can bind the owners by a bill of lading for goods received on board the ship, a bill of lading, although in the usual terms, given by the master, in an instance where goods had never been received on board, does not bind the owners even in the hands of an assignee. All persons taking a bill of lading by endorsement or otherwise, have notice that the master's authority is limited to signing bills of lading for goods received on board, and must themselves bear the consequences of the master's falsehood (*x*). On a somewhat similar principle, in a case where the defendant authorized an insurance broker at Liverpool to underwrite policies not *exceeding a certain amount, and the broker acted in excess of his authority, the principal was held not liable, it being the custom at Liverpool to impose a secret limit on the amount for which an insurance broker can sign his principal's name (*y*).

(*t*) *Howard v. Sheward*, L. R. 2 C. P. 148; 36 L. J. (C. P.) 42.

(*u*) *Westropp v. Solomon*, 8 C. B. (65 E. C. L. R.) 345.

(*x*) *Grant v. Norway*, 20 L. J. (C. P.) 98; 10 C. B. (70 E. C. L. R.) 665, *S. C.* See *Hubbersty v. Ward*, 22 L. J. (Ex.) 113; 8 Ex. 330; *Coleman v. Riches*, 24 L. J. (C. P.) 125; 16 C. B. (81 E. C. L. R.) 104.

(*y*) *Baines v. Ewing*, L. R. 1 Ex. 320; 35 L. J. (Ex.) 194.

It has no doubt been observed in the examples just given, that in some of them the extent of the agent's authority is expressly prescribed, in some partly expressed and partly not expressed, and in others altogether implied. It is implied from the position or capacity in which a person acts. Of this description is the agency of factors, brokers, of partners, wives, and servants, all of whom have an implied or constructive authority to bind those for whom they act, or are held to act, as we shall presently see more at large. The usages of trade form material points in determining the authority of an agent; and the custom of an individual as to the general mode and scope of his dealings with tradesmen, would, as we have seen, limit the implied authority of his servants to bind him by their orders. Wherever acts are done inconsistently with express directions or with the customary transactions from which agency may be implied, there is an excess of authority, and the principal is not bound.¹ In *Fleming v. Hector* (2), it was held, on similar *grounds, [*430] that where there is a managing committee of a club who choose to deal on credit instead of for ready money payments, which they were alone authorized by the members to do, the members are not bound by such contracts.

Many cases also occur where there is no such con-

(2) 2 M. & W. 172. See *Cockerell v. Aucompte*, 2 C. B. (N. S.) (89 E. C. L. R.) 440; 26 L. J. (C. P.) 194.

¹ And therefore it has been held, that where the authority purports to have been derived from a written instrument, or the agent expressly signs the contract, "by procuration," the party dealing with him is put upon inquiry, and is bound to examine the instrument: *Attwood v. Munnings*, 7 B. & C. (14 E. C. L. R.) 278; *Withington v. Herring*, 5 Bing. (15 E. C. L. R.) 442; *Schimmelpennich v. Bayard*, 1 Pet. 264; *North River Bank v. Aymar*, 3 Hill, 262.—R.

structive or express authority at the time of the contract, but where it has been supplied by the subsequent assent or adoption of the principal, in which case his liability depends upon the same general reason as before. The subsequent ratification is equivalent to a prior command, and the great maxim of agency, "*Qui facit per alium facit per se*," has a retrospective effect. And such ratification may be inferred from the conduct of the principal, as well as expressed by him in words. Thus, Pollard, having sent a quantity of goods for sale to Fernando Po, died intestate. After his death the defendant purchased the goods from the agent of the intestate, who sold them for the benefit of the estate. At the time of sale no administration to the intestate had been granted. Subsequently the plaintiff took out letters of administration. The Court, after first laying it down that the title of administrator relates back to the death of the intestate, decided that the plaintiff had, by suing, ratified the sale by the agent, and that it was no objection that he was unknown to the agent at [*431] the time of sale (a). But, as the question is, whether the principal did or did not approve of the transaction to which it is endeavoured to make him a party through the agency of another, it is held that the former cannot ratify a part of the transaction and repudiate the rest, but must adopt the whole or none (b). But, where a person at the time of doing an act does not profess to be therein acting as an agent, there is nothing, strictly speaking, to ratify; and another person, however interested, cannot afterwards, by adopting the act, make the former his agent, and

(a) *Foster v. Bates*, 12 M. & W. 226; *Lewis v. Read*, 13 M. & W. 834; *Robinson v. Gleadow*, 2 Bing. N. C. (29 E. C. L. R.) 156; *Freeman v. Bosher*, 13 Q. B. (66 E. C. L. R.) 780.

(b) *Wilson v. Poulter*, 2 Str. 859; *Brewer v. Sparrow*, 7 B. & C. (14 E. C. L. R.) 310.

thereby incur any liability or take any benefit under the unauthorized act. This is a rule of considerable importance, and is fully explained in the case of *Wilson v. Tumman (c)*.¹

But the rule, that the agent acting within the extent of his usual employment binds his principal, though in the particular case the agent is exceeding his authority, is subject to the observation that the person who contracts with the agent has not *notice* of the limitation of his authority. It is very right that a stranger who sees an agent permitted to contract generally for his principal in this or that business should be safe in dealing *with him, on the assumption that he has [*432] authority. But if he *knows* that he has no authority, in that case to hold the principal bound by a contract made contrary to the agent's real instructions, would be to give effect to a fraud; and accordingly, wherever the person who contracts with an agent *knows* that that agent's authority is limited, and nevertheless contracts with him beyond those limits, he does so at his peril, for the principal is not bound (*d*). And on this account it is wise and usual for persons who have been in the habit of employing a general agent, and are desirous of discontinuing him, to give notice to the world of their intention in the Gazette, and to those persons with whom they are in the habit of dealing, by circulars (*e*). For the agent, although discontinued, might still make his principal liable to those who dealt with the agent, without notice of the revocation of his authority. This rule is well illustrated by the case of

(c) 6 M. & Gr. (46 E. C. L. R.) 236; *Anon.*, Godbolt, 109.

(d) See *Trueman v. Loder*, 11 A. & E. (39 E. C. L. R.) 589.

(e) See *Smith's Merc. Law*, 9th ed. 122.

¹ *Bearce v. Bowker*, 115 Mass. 129; *Carson v. Cummings*, 69 Mo. 325.

Drew v. Nunn (*f*). There the plaintiff was a tradesman, and the defendant had given his wife authority to deal with the plaintiff, and had held her out as his agent and as entitled to pledge his credit. Afterwards, the defendant became insane, and whilst his malady lasted, his wife ordered goods from the plaintiff, who [*433] accordingly supplied them. At the *time of supplying the goods the plaintiff was unaware that the defendant had become insane. The defendant afterwards recovered his reason, and then refused to pay for the goods supplied to his wife by the plaintiff. It was held that even if the insanity were so complete as to amount to a revocation of the authority as between the principal and the agent, yet that as the plaintiff had no notice of it the defendant was liable for the price of the goods.

(*f*) 4 Q. B. D. 661; 48 L. J. (Q. B.) 591.

PRINCIPAL AND AGENT.—THEIR RESPECTIVE LIABILITIES.—AGENCY OF PARTNERS, BROKERS, FACTORS, WIVES.—RECAPITULATION.—REMEDIES BY ACTION.—STATUTES OF LIMITATION.

PURSUING the consideration of the points arising upon contracts made through the medium of agents, and having disposed of most of those which relate to the liability of the principal upon them, the next in order is that which regards his power to take advantage of them. Now, where the agent (*a*), when he makes the contract, states who his principal is, and states that he is contracting on the behalf of that principal; or where (though there may be no express statement to that effect) the circumstances of the transaction can be shown to have been so completely within the knowledge of the parties to it that there can be no doubt that it was understood at the time that the person who actually made the contract made it as an agent, and intended to make it on behalf of his principal; in such cases there can of course be no doubt of the principal's right to take advantage of it, and enforce it to the fullest extent. It is, in *truth, as if he had put his own hand to it. In such cases, therefore, there can be no difficulty. But the cases in which difficulties arise, are those in which the agent, being really only the substitute for another, nevertheless contracts in his own name as if he were himself the principal.¹ [*435]

(*a*) *Seignior v. Wolmer*, Godb. 360.

¹ *George v. Clagett*, 7 T. R. 359; *Purchell v. Salter*, 1 Q. B. (41 E. C. L. R.) 197; *Sims v. Bond*, 5 B. & Ad. (27 E. C. L. R.) 393; *Lime Rock Bank v.*

Now, in such a case, the principal may adopt and enforce the contract (*b*), but his right to do so is subject to a qualification which has been dictated by common sense and public convenience, namely, that, on declaring himself, he stands in the place of the agent who made it; so that the other contracting party enjoys the same rights against him which he would have enjoyed against the agent who made it, had that agent really been the principal. For instance, if I buy a parcel of goods from A., who sells them to me in his own name, though he is really only the factor of B., whose property the goods are, B. may, if he think proper, declare himself the principal, and require me to pay the price to him; but if the factor owed me money which I could have set off against the price had the factor sued me for it, I have the right of setting it off against B., in like manner as I might have done against the factor. And the good sense and justice of this is obvious; for it may be exceedingly inconvenient, indeed ruinous to me, to pay [*436] ^{*in hard cash}; and my knowledge that I should have this set-off may have been my only in-

(*b*) *Cooke v. Seeley*, 17 L. J. (Ex.) 286; 2 Ex. 746, *S. C.*; *Spurr v. Cass*, L. R. 5 Q. B. 656; 39 L. J. (Q. B.) 249.

Plimpton, 17 Pick. 159; *Leeds v. Marine Ins. Co.*, 6 Wheat. 570; *Violett v. Powell*, 10 B. Mon. 347; *Parker v. Donaldson*, 2 W. & S. 21.

As the lecturer has elsewhere expressed it, "in every case in which the agent sues in his own name, two consequences, it must be remembered, follow: 1. That the defendant may avail himself of those defences which would be good as against the agent who is the plaintiff on the record: *Gibson v. Winter*, 5 B. & Ad. (27 E. C. L. R.) 96; *Wilkinson v. Lindo*, 7 M. & W. 83. 2. That he may avail himself of those which would be good as against the principal, for whose use the action is brought: *Welstead v. Levy*, 1 M. & Rob. 138; *Meggison v. Harper*, 4 Tyr. 94; *Rex v. Hardwick*, 11 East, 578; *Harrison v. Vallance*, 1 Bing. (8 E. C. L. R.) 45; *Smith v. Lyon*, 3 Camp. 465." Note to *Thomson v. Davenport*, 2 Sm. L. C. 398.—R.

Huntington v. Knox, 7 Cush. 371; *Doe v. Thompson*, 22 N. H. 217.—S.

Haverhill Ins. Co. v. Newhall, 1 Allen, 130; *Quigley v. De Haas*, 82 Pa. St. 267; *Bryson v. Lucas*, 84 N. C. 680.

ducement to buy; and if I were deprived of it, I should be led into a trap—induced to purchase upon one ground, and forced to pay upon a different one.

The general rule, that a principal may declare himself, and take advantage of his agent's contract made without naming him, and this qualification of it (to prevent the injustice of which it might otherwise be made the instrument), are both very clearly laid down in the judgment in *Sims v. Bond* (c):—"It is a well established rule of law," said the L. C. Justice, delivering the judgment of the Court in that case, "that where a contract *not under seal* is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it¹—the defendant, in the latter case, being entitled to be placed in the same situation at the time of disclosure as if the agent had been the contracting party."² This rule is most frequently acted upon in sales by factors, agents, or partners, in which cases either the nominal or the real contractor may sue, but it may be equally applied to other cases. Thus, in *George v. Claggett* (d),³ the case was this: the

(c) 5 B. & Ad. (27 E. C. L. R.) 393; *Ramazotti v. Bowring*, 29 L. J. (Ch.) 30.

(d) 7 T. R. 359; 2 Smith L. C. 118, 8th ed.; *Isberg v. Bowden*, 22 L. J. (Ex.) 322; 8 Ex. 852.

¹ Unless, indeed, the defendant relied on the plaintiff's character as agent, and would not have contracted with him as a principal if he had known him so to be: *Schmalz v. Avery*, 3 Eng. L. & Eq. R. 391.—R.

² If, however, the defendant either knew, or had the reasonable means of knowing that he was dealing, not with an agent, but with a principal, the latter part of the rule, as thus expressed, obviously loses its application: *Baring v. Corrie*, 2 B. & Ald. 137; so, if the purchaser knew that the seller was not the owner of the goods, but a factor—in such case, he can have no set-off against the latter, whether the suit be brought in the name of the principal or in his own name: *Parker v. Donaldson*, 2 W. & S. 9; for in neither of these cases is the purchaser deceived.—R.

³ And see the note to that case in 2 Sm. L. C. 118.—R.

plaintiff, a clothier, employed Rich and Heapy as his factors, who, besides acting as factors, bought and [*437] *sold great quantities of woollen cloths on their own account, and carried on all their business at one warehouse. Rich and Heapy became largely indebted to the defendants on a bill of exchange, and afterwards the latter purchased woollen cloths of them to an amount greater than the debt on the bill. Part of the cloths really belonged to the plaintiff, but the defendants did not know it, and on his suing the defendants for the price of his cloth so bought by them from Rich and Heapy, the defendants were considered to be entitled to set off the debt of Rich and Heapy to them. "By the statute of set-off (*e*)," said *Holroyd, J.*, in the very similar case of *Carr v. Hinchliff* (*f*), "when there are mutual debts between a plaintiff and a defendant, the latter may set off the debt due to him against that which is claimed. The statute gives him a right to say, that the debt claimed is paid by that which is due to him, and that it operates as an extinguishment of the debt. And now, by analogy to the defence given by the statute, a defendant is also entitled to say that his debt is extinguished by another debt due to him from any person who may be identified with the plaintiff." Even where the defendant was aware that he was dealing with an agent, a factor, but the latter was accustomed to sell in his own name when he had any claim [*438] against the owner of the *goods for advances, and the purchaser, in buying the goods in question, *bonâ fide* believed that the factor sold them for the purpose of satisfying such a claim, it was decided that the purchaser was entitled to set off the payments made

(*e*) 2 Geo. II., c. 22; now repealed by 46 & 47 Vict., c. 49, s. 4, but see ss. 5, 7, of the latter Act.

(*f*) 4 B. & C. (10 E. C. L. R.) 553.

by him to the factor. This was the case of *Warner v. M'Kay* (*g*), where the Court treated the question as being, whether the defendant had a right to consider that he had *paid* the factors for those goods. The only doubt arose from the defendant being apprised that the goods belonged to the plaintiffs. But as the factors were accustomed to sell in their own names, and did sell these goods in their own names, and the jury having found that the defendant believed that they had authority to sell, and was not bound to inquire further, the Court supported a verdict for the defendant. But if the purchaser knew all along that he was dealing with an agent, he cannot set off, in an action by the principal for the price of goods bought by him of the agent, a debt due from the agent to himself; for that would be treating the agent and the principal as one, where they are not identified, and creating instead of preventing the injustice which the law thus seeks, by allowing a set-off of this kind, to prevent (*h*). The real *grounds on which the before-mentioned cases have been [*439] decided, were stated by the Court of Exchequer, in *Isberg v. Bowden* (*i*), to be "that when a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the real contracting party, and is entitled to the same defence,

(*g*) 1 M. & W. 591. See, however, the remarks on this case in *Fish v. Kempton*, 7 C. B. (62 E. C. L. R.) 687.

(*h*) *Fish v. Kempton*, 7 C. B. (62 E. C. L. R.) 687; *Dresser v. Norwood*, 34 L. J. (C. P.) 48, Ex. Ch.; *Semenza v. Brinsley*, 18 C. B. (N. S.) (114 E. C. L. R.) 467; 34 L. J. (C. P.) 161; *Dixon ex parte, in re Henley*, 4 Ch. Div. 133. See also *Mildred v. Maspons*, 8 App. Cas. 874, 53 L. J. (Q. B.) 33, affirming *Maspons v. Mildred*, 9 Q. B. D. (C. A.) 530, 51 L. J. (Q. B.) 604; *New Zealand and Australian Land Co. v. Watson*, 7 Q. B. D. 374 (C. A.), 50 L. J. (Q. B.) 433, reversing *S. C. nom. New Zealand, etc., Co. v. Ruston*, 5 Q. B. D. 474; 49 L. J. (Q. B.) 842.

(*i*) 8 Ex. 852.

whether it be by common law or by statute, by payment or by set-off, as he was entitled to at that time against the agent, the apparent principal." The principle, however, of *George v. Clagett* applies only to what may be said to be the proximate motive of dealing with the factor. Thus, it was held, that in the event of the latter's bankruptcy, the defendant would not be allowed to set-off against the principal's claim, all claims arising out of mutual dealings of which defendant might have availed himself, under ss. 31, 39, of the now repealed statute, 32 & 33 Vict., c. 71 (Bankruptcy Act, 1869). The contingency of the bankruptcy and the mode of settling accounts with the trustee *could not be [*440] considered to have been contemplated when the contract was made with the agent (*k*). It seems sufficiently connected with these propositions, to add here, that where the principal does not intervene, but allows the agent to sue in his own name, two consequences follow: 1st, that the defendant may avail himself of all defences which would be good against the agent, who is by the supposition the plaintiff on the record (*l*); 2ndly, that he may avail himself of those which would be good against the principal for whose sole use the action has been brought (*m*).

Before leaving this subject, I will say one word with regard to the situation of an agent who contracts in the manner I have just mentioned, without naming his principal. It is settled that, in such a case, the other contracting party may, when he discovers the true state

(*k*) *Turner v. Thomas*, L. R. 6 C. P. 610; 40 L. J. (C. P.) 271. This decision seems equally applicable to claims arising out of mutual dealings made under the similar sections of 46 & 47 Vict., c. 52 (Bankruptcy Act, 1883), viz., ss. 37, 38.

(*l*) *Gibson v. Winter*, 5 B. & Ad. (27 E. C. L. R.) 96; *Wilkinson v. Lindo*, 7 M. & W. 81.

(*m*) *May v. Taylor*, 6 M. & Gr. (46 E. C. L. R.) 261; *Meggison v. Harper*, 2 C. & M. 322.

of facts, elect to charge him or his principal (*n*), whichever he may *think most for his advantage. [*441] Thus, in *Paterson v. Gandasequi* (*o*), the defendant, who was a Spanish merchant, employed Larrazabal to purchase for him various assortments of goods for the foreign market, for which he was to charge a commission of 2 per cent. Larrazabal applied to the plaintiffs, and requested them to send to his counting-house an assortment of the goods, with terms and prices. Paterson brought patterns of the goods to the counting-house with the terms and prices, when Gandasequi was present. The samples were handed to him. He inspected them, selected such as he required, and the terms and prices were shown to him, and left there; subsequently Larrazabal, in pursuance of directions from Gandasequi, ordered the goods from Paterson. The latter sold the goods on the credit of Larrazabal, made out the invoices in his name, and sent them to him, and Larrazabal debited the amount to Gandasequi. **"The law,"* said Lord *Ellenborough*, *"has* [*442] *been settled by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him."* On the other hand, if the agent contract without naming any principal, he is himself the person *primâ facie* responsible;

(*n*) The creditor has an election to sue either the one or the other; but he cannot after he has sued the one to judgment, maintain a second action against the other. *Priestly v. Fernie*, 34 L. J. (Ex.) 172; 3 H. & C. 977. The mere fact of filing an affidavit of proof against the estate of an insolvent agent to an undiscovered principal, after that undiscovered principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor: *Curtis v. Williamson*, L. R. 10 Q. B. 57; 44 L. J. (Q. B.) 27. †

(*o*) 15 East, 62; 2 Smith, L. C. 360, 8th ed.; see also *Waring v. Favenck*, 1 Camp. 85; *Kymer v. Suwercropp*, 1 Camp. 109; *Heald v. Kenworthy*, 24 L. J. (Ex.) 76; 10 Exch. 739; *Smethurst v. Mitchell*, 28 L. J. (Q. B.) 241; *Risbourg v. Bruckner*, 27 L. J. (C. P.) 90; 3 C. B. (N. S.) (91 E. C. L. R.) 812; *Greene v. Koptree*, 25 L. J. (C. P.) 297; 18 C. B. (86 E. C. L. R.) 549; *Calder v. Dobell*, L. R. 6 C. P. 486; 40 L. J. (C. P.) 89, 224.

and though the other party may, in most cases, elect to charge the employer on discovering him, yet he need not do so, but may, if he please, continue to look to the agent (*p*). He may also elect to charge either the agent or his principal, where the agent, at the time of making the contract, says that he has a principal, but declines to say who that principal is (*q*).¹ It is im-

(*p*) *Morgan v. Corder*, Paley Prin. and Agent, 3rd edit. p. 372; *Smith's Merc. Law*, by Dowdeswell, 9th edit. p. 159, &c.; *Paterson v. Gandasequi*, *supra*.

(*q*) *Thomson v. Davenport*, 9 B. & C. (17 E. C. L. R.) 78; 2 *Smith L. C.* 377, 8th edit.; *Cooke v. Wilson*, 26 L. J. (C. P.) 15; 1 C. B. (N. S.) (87 E. C. L. R.) 153.

¹ [Note by Mr. J. C. Symons.] The right to sue the principal when disclosed does not apply to bills of exchange accepted or endorsed by the agent in his own name alone, and not *per proc.*, for by the law of merchants, a chose in action is passed by endorsement, and each party who receives the bill is making a contract with the parties upon the face of it, and with no other party whatever. See *Beckham v. Drake*, 9 M. & W. 92, per Lord Abinger, C. B. [*Bank of Hamburg v. Wray*, 4 Strob. 87.]

Bacon v. Sondley, 3 Strob. 542; *Perth Amboy Manufacturing Co. v. Condit*, 21 N. J. 659, unless the circumstances attending the contract are such as to show an intention to look solely to the one and not to the other. If the vendor, knowing of the principal, still credits and looks to the agent as the responsible party, he of course exonerates the principal: *Paige v. Stone*, 10 Metc. 160; *Jones v. Ætna Ins. Co.*, 14 Conn. 501; *Ahrens v. Cobb*, 9 *Humph.* 643; *Violett v. Powell*, 10 B. Mon. 347; *Bate v. Burr*, 4 *Harring.* 130; and this, whether the latter has or has not received the property: *Ahrens v. Cobb*. But it is obvious, that the mere fact of charging the goods to the agent, should not raise a presumption that the vendor thereby meant to rely solely on the latter, unless the name, and perhaps also the situation and circumstances, of the principal be also known to the vendor, for certainly unless he knew the *name* of the principal, there can be no opportunity of electing between him and the agent: *Lapham v. Green*, 9 Vt. 407; *Edwards v. Golding*, 20 *Ib.* 30; *Henderson v. Mayhew*, 2 *Gill*, 393; and it would seem that unless he knew, also, something of his *circumstances*, the case would be the same: *Raymond v. The Crown and Eagle Mills*, 2 Metc. 319; *Upton v. Gray*, 2 Me. 374. See the note to *Thomson v. Davenport*, 2 *Sm. L. C.* 398.—R.

Brown v. Rundlett, 15 N. H. 360; *Hovey v. Pitcher*, 13 Mo. 191; *Hyde v. Paige*, 9 *Barb.* 150; *Johnson v. Smith*, 21 Conn. 627; *Ogden v. Raymond*, 22 *Ib.* 379; *Sydnor v. Hurd*, 8 *Tex.* 98. In simple contracts, if the agent does not disclose his agency, he binds himself, and so if he exceeds his authority: *Royce v. Allen*, 28 Vt. 234; *Hodges v. Green*, *Ib.* 358; *Forney v. Shipp*, 4

portant to bear in mind the rule, that this election, when once made, is binding. This is the main point which is illustrated by the case of *Paterson v. Gandasequi*, already cited, when, under the facts before described, the Court laid down, that if the seller of goods knows, at the time of making the contract of sale, that the buyer, although dealing with him in his own name, is in reality the agent of another, and elects to give credit to the agent, he cannot afterwards recover *the value from the known principal. In the sub- [*443]sequent but almost cotemporary case of *Addison v. Gandasequi* (*r*), the latter, who had acted towards the plaintiff in a similar manner to that described in noticing the case of *Paterson v. Gandasequi*, was held not to be liable, *Addison* having, with full knowledge of the facts, debited *Larrazabal* in his books. In both these cases there was evidence that the vendor had elected to look to the agent for payment, knowing at the time of the contract, that another person was the principal, and also knowing who that principal was; but in *Paterson v. Gandasequi*, there being some doubt how far the plaintiff had a perfect knowledge of the fact that the defendant was the principal at the time of the contract, the Court granted a new trial. There was no such doubt in *Addison v. Gandasequi*. In the more recent case of *Thomson v. Davenport* (*s*), which was a writ of error brought on a judgment obtained in the borough

(*r*) 4 Taunt. 573; 2 Smith L. C. 369, 8th edit.

(*s*) *Supra*, n. (*q*).

Jones, 527; *McClellan v. Parker*, 27 Mo. 162; *Murray v. Carothers*, 1 Metc. (Ky.) 71. A written agreement signed "A. B. by C. D. agent," does not bind the agent personally, although the principal resides beyond seas: *Bray v. Kettell*, 1 Allen, 80. When a person proposes to act as an agent, disclosing the name of his principal, he assumes no personal responsibility, unless he acts fraudulently: *Seery v. Socks*, 29 Ill. 313; *Baker v. Chambles*, 4 Greene, 428. A party who signed notes as president of a bank which has no legal existence is personally liable on them: *Allen v. Pegram*, 16 Iowa, 163.—s.

Court of Liverpool against Thomson, the plaintiff in error, one M'Kune having received an order from Thomson for the purchase of goods, ordered them from Davenport & Co., the plaintiffs in the Court below, letting them know that they were for his employer, but not mentioning the name of any principal. Davenport and Co. [*444] named M'Kune as *purchaser in the invoice of the goods: the Court considered that these plaintiffs, having treated M'Kune as their debtor, whilst ignorant of the real purchaser, were not bound by that election, but might afterwards sue the principal, Thomson, for the price. "I take it to be a general rule," said Lord *Tenterden*, "that if a person sells goods (supposing at the time of the contract that he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; *subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal.* On the other hand, if, at the time of the sale, the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him, and him alone, then the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods the plaintiffs [*445] were informed that *M'Kune, who came to them to buy the goods, was dealing for another,

that is, that he was an agent; but they were not informed *who* the principal was. They had not, therefore, at that time, the means of making their election. It is true, that they might perhaps have obtained those means if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls, in substance and effect, within the first proposition that I have mentioned, the case of a person not known to be an agent, and not within the second, where the buyer is not merely known to be an agent, but the name of his principal is also known. There may be another case, and that is, where a British merchant is buying for a foreigner. According to the universal understanding of merchants and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner" (*t*), although, of course, a contract may be made by the agent so as to charge the foreigner and not himself (*u*). Indeed, it hardly requires mentioning, that the question, which is liable—*the [*446] foreign principal or the English agent—is one of intention (*v*), in which the fact, that the principal debtor is a foreigner residing abroad, renders it highly improbable that the credit should have been given to him (*x*).

(*t*) See *Wilson v. Zulueta*, 19 L. J. (Q. B.) 49; 14 Q. B. (68 E. C. L. R.) 405, *S. C.*; *Armstrong v. Stokes*, L. R. 7 Q. B., at p. 605, 41 L. J. Q. B., at p. 257; *Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313, 42 L. J. (Q. B.) 151; *Hutton v. Bullock*, L. R. 8 Q. B. 331.

(*u*) *Mahoney v. Kekulé*, 23 L. J. (C. P.) 54; 14 C. B. (78 E. C. L. R.) 390, *S. C.*

(*v*) *Green v. Koptree*, 25 L. J. (Ch.) 297; *Deslandes v. Gregory*, 20 L. J. (Q. B.) 93; *S. C.* in Ex. Ch., 30 L. J. (Q. B.) 36.

(*x*) *Lennard v. Robinson*, 24 L. J. (Q. B.) 275; 5 E. & B. (85 E. C. L. R.) 125.

But there is this qualification to the right of election (*y*), namely, that if the state of accounts between the agent and principal have been altered, so that the principal would be [unjustly] subjected to a loss by the other contracting party's election, the right of election is in such case lost. Suppose, for instance, I employ A. to purchase goods, and he purchases them from B. in his own name; now B., when he discovers me to be the real principal, may elect whether he will treat me or my agent A. as his debtor; but if, in the meantime, I have paid A. [under circumstances which would make it unjust for B. to treat me as still his debtor (*z*)], he will lose that right, since otherwise I should have to pay the price twice over. Still, this qualification is itself subject to a minor one, namely, that the principal cannot, by prematurely and improperly settling with [*447] his agent, deprive the other *contracting party of his right of election. Suppose, for instance, as in the case I have just put, that I employ A. to purchase goods, not for ready money, but at three months' credit. A. purchases in his own name from B.; B., before the three months have elapsed, discovers the true state of affairs, and elects to take me as his debtor. I should not be allowed to say, in this case, "You are too late; I have settled with A., my agent." The answer would be, "You had no occasion to do so pending the time of credit; and you cannot, by doing so, deprive B. of his right to elect you as his debtor" (*a*).¹

(*y*) As already mentioned in the judgment of Lord Tenderden just quoted.

(*z*) See *Heald v. Kenworthy*, 10 Ex. 739; 24 L. J. (Ex.) 76; *Armstrong v. Stokes*, L. R. 7 Q. B. 598; 41 L. J. (Q. B.) 253.

(*a*) *Thomson v. Davenport*, *supra*; and *Kymer v. Suwercropp*, 1 Camp. 109.

¹ [Note by Mr. J. C. Symons.] The cases in which an agent is personally liable, and may be sued on the contract he makes, may be thus classed:—

In the first place, he is liable, according to the doctrine in *Thomson v.*

In the case of *Kymer v. Suwercropp*, Lord *Ellenborough* said, "A person selling goods is not confined to the credit of a broker who buys them, but may resort

Davenport, where the principal was not disclosed at the time of the contract; but if he were known, and credit given to *him* at the time, the agent cannot be afterwards sued, provided he acted within the scope of his authority: *Patton v. Brittain*, 10 Ired. 8.

In the second place, the agent is liable, as we have already stated, where he exceeds his authority, or represents himself to have an authority which he has not, the want of authority being unknown to the other party: *Jones v. Downman*, 4 Q. B. (45 E. C. L. R.) 235; [*Dusenbury v. Ellis*, 3 Johns. Cas. 70; *Meech v. Smith*, 7 Wend. 315; *Woods v. Dennett*, 9 N. H. 55;] for in such cases the creditor has no remedy against the principal: *Wilson v. Barthrop*, 2 M. & W. 863.¹ Here again, however, arises a question, as we have seen, how far *Smout v. Ibery* (*supra*) is good law, and that the agent is to be held liable where it cannot be proved that he fraudulently misrepresented his authority. But that case clearly decides another very important point, namely, that where a man has been in the habit of dealing with the plaintiff for household goods, the wife is not liable for such as are supplied to her after his death, but before information of his death had been received, she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge, relating to it; the revocation itself being by the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties.

In the third place, an agent is liable for himself and his heirs under seal, for the act of the principal, though he describes himself in the deed as covenanting for and on behalf of such other person: *Hancock v. Hodgson*, 4 Bing. (13 E. C. L. R.) 269; *Appleton v. Binks*, 5 East, 148.²

An agent is liable, in the fourth place, where he contracts in writing in his

¹ *Hampton v. Speckenagle*, 9 S. & R. 212, unless, of course, the principal should have subsequently ratified the agent's act: *Bragg v. Fessenden*, 11 Ill. 544; *Fitzsimmons v. Joslin*, 21 Vt. 129; but such ratification by the principal must be shown to have been made with a full knowledge of the facts, and an understanding that he would not be liable unless he did so ratify: *Fletcher v. Dysart*, 9 B. Mon. 413.—R.

² *Burrell v. Jones*, 3 B. & Ald. 47; *Sumner v. Williams*, 8 Mass. 162; *Belden v. Seymour*, 8 Conn. 24; *Whiting v. Dewey*, 15 Pick. 433; *Donahoe v. Emery*, 9 Metc. 66; *Mason v. Caldwell*, 5 Gilm. 196. It has, however, been held, in a few cases, that where a person expressly covenants in his representative capacity, "and not otherwise," he will not be personally liable, as no false confidence of security is excited on the part of the purchaser: *Thayer v. Wendell*, 1 Gall. 37, per Story, J.; *Day v. Brown*, 2 Ohio, 347; *Manifee v. Morrison*, 1 Dana, 208; *Craddock v. Stewart*, 6 Ala. 77.—R.

to the principal on whose account they are bought; and he is no more affected by the state of accounts between the two than I should be were I to deliver goods to a man's servant pursuant to his order, by the consideration of whether the servant was indebted to the master, or the master to the servant. If he lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if, in [*448] that case, the price of the goods has been paid to the broker on account of this deception, *the

own name,¹ unless it appears on the face of the contract that he did so only as an agent,² otherwise he will not be allowed to give parol proof that he contracted as agent, so as to relieve himself from responsibility. But parol evidence may nevertheless be given to charge an unknown principal, as it does not deny that the contract is binding on those whom, on the face of it, it purports to bind, but shows that it also binds another by reason that the act of the agent in signing the agreement in pursuance of his authority is, in law, the act of the principal: *Higgins v. Senior*, 8 M. & W. 844, per Parke, B. See also *Jones v. Littleedale*, 1 N. & P. (36 E. C. L. R.) 677; *Magee v. Atkinson*, 2 M. & W. 440.

¹ *Burrell v. Jones*, 3 B. & Ald. 47; *Hopkins v. Mehaffy*, 11 S. & R. 129; *Kirkpatrick v. Stainer*, 22 Wend. 244; *Taintor v. Prendergrast*, 3 Hill, 72; *Simonds v. Heard*, 23 Pick. 121.—R.

² In *Higgins v. Senior*, the point actually decided was, that a defendant could not shift a liability from his own shoulders to that of another, by showing that a contract which purported to be signed on his own account was, in reality, signed as agent for another; and the same has been held in this country, even in cases where the party signed as agent, but not naming the principal: *Pentz v. Stanton*, 10 Wend. 277; *Stackpole v. Arnold*, 11 Mass. 27; *Alfridson v. Ladd*, 12 Ib. 175; *Bradlee v. Glass Co.*, 16 Pick. 347. But in *Higgins v. Senior*, it was further suggested, as had also been done in *Jones v. Littleedale*, that a distinction existed between evidence to discharge a defendant, and evidence to charge an additional party; as, in the latter case, the evidence would not contradict the written instrument, but only show that it bound another party.—R.

It is no defence to an action on the individual note of an agent that it was given for the debt of his principal, and that of this fact the plaintiff had knowledge: *Bass v. Randall*, 1 Minn. 404; *Haverhill Ins. Co. v. Newhall*, 1 Allen, 130. A written contract, to which one has without authority affixed the name of another, but not his own, binds neither: *Hegeman v. Johnson*, 35 Barb. 200.—s.

principal shall be discharged. But in this case, payment was demanded of the defendant on the several days it became due, and no reason was given him to believe that the broker alone was trusted. The defendant had received a great part of the goods; the right of the vendors was entire unless the defendant had paid the price to them, or to some person authorized by them to receive it. The broker had no such authority; therefore the defendant is liable." In that case, as observed by the Court of Common Pleas, in the subsequent case of *Smyth v. Anderson* (b), Lord *Ellenborough* must be considered as having properly decided that the defendant had no right to set up a payment accepted by the brokers contrary to their duty, and not made by him in conformity with the obligation which the contract imposed upon him.

In the case of *Smyth v. Anderson* (c), just mentioned, Melville ordered of the plaintiffs certain goods, telling them they were for shipment to Bombay, pursuant to orders received. They were in fact ordered for Anderson, and were received by him; but Melville could not say whether, at the time of giving the order, the name of Anderson was mentioned. The invoices, however, sent afterwards, described the goods as "bought on account of Anderson, Bombay, per Melville, London, by Pender & Co., agents" (the plaintiffs). In [*449] *payment for those goods, the plaintiffs drew bills upon Melville, which bills were dishonoured. Melville had a general account with Anderson, on which, at the time of his stopping payment, he was debtor to Anderson in a large amount. There was no evidence of any payment by him to Melville applicable to these good in particular; but shortly after the ship-

(b) 7 C. B. (62 E. C. L. R.) 39.

(c) 18 L. J. (C. P.) 109; 7 C. B. (62 E. C. L. R.) 21, S. C.

ment of them, Melville sent Anderson an account debiting him with the amount of the bills, and the latter had since, but before they became due, remitted to Melville an amount more than sufficient to cover them. "Melville," said *Maule*, J., "having become insolvent, Anderson is sued for the price, and the question is, whether it is fair and reasonable he should be so charged. The plaintiffs got what they considered an advantage, the security of Melville, and must be taken to have requested that all might be done that was necessary and incident to that arrangement; and, therefore, the remittance made by Anderson to provide for the bills, which was the natural and proper course to be taken by him, was substantially made with the cognizance and at the request of the plaintiffs; can they then be permitted to call upon the defendant to pay the price of the goods over again? I think it a clear and satisfactory case of non-liability on the part of the defendant, who, in the course of a transaction to which the plaintiffs themselves were parties, has done that which, substantially, is a payment in the ordinary [*450] course of *business. The fact that the money was paid before the bills became due, does not prevent the defendant from availing himself of this defence. When all the parties are living in this country, and the agent has not accepted bills on account of the goods, so that the duty of putting him in funds by a previous remittance does not arise, if the principal pays the broker before the proper time has arrived, and without the privity of the seller, one can perceive the justice of not permitting the principal to set up such premature payments in answer to the seller's claim on him for the price."

The qualification or exception to the rule as to the right of election of the seller is given somewhat differ-

ently by Mr. Justice *Blackburn*, in *Armstrong v. Stokes* (*d*), viz., "that nothing has occurred to make it unjust that the undisclosed principal should be called upon to make the payment to the vendor." But he observes that it is not very accurately defined; and the same observation applies to the qualification as given *ante*, p. *446. It certainly must not be assumed that a mere payment by the principal to his agent, although *bonâ fide*, and free from the blame of a premature settlement, will absolve the principal from the duty of seeing that the agent pays the money over to the seller (*e*). And in *Heald v. Kenworthy*, just cited, *Parke*, B., was strongly of opinion (in which *Follock*, C. B., and *Alderson*, B., concurred) that there was "no authority for saying that a payment made to the agent precludes the seller from recovering from the principal, unless it appears that he has induced the principal to believe that a settlement has been made with the agent," i. e., by the seller, in consequence of which belief the principal pays the agent. This opinion, indeed, in *Armstrong v. Stokes* (*f*), seems to have been thought to narrow the qualification to the seller's right of election too much, for there Mr. Justice *Blackburn*, in a judgment in which all the authorities are most carefully reviewed, observes that *Parke*, B., "makes no exception as to the case where the other side made the contract with the agent believing him to be the principal, and continued in such belief till after the payment was made;" and further on he says, "We think that, if the rigid rule thus laid down were to be applied to those who were only discovered to be principals after they had fairly paid the price to those whom the vendor

(*d*) L. R. 7 Q. B. 598, 604; 41 L. J. (Q. B.) 253, 256.

(*e*) *Heald v. Kenworthy*, 10 Exch. 739; 24 L. J. (Ex.) 76

(*f*) L. R. 7 Q. B. 609, 610; 41 L. J. (Q. B.) 259.

believed to be the principals, and to whom alone the vendor gave credit, it would produce intolerable hardship." In this case, accordingly, where the defendants (the undisclosed principals), after the contract was [*452] made, and in consequence of it, *bonâ fide* and *without moral blame paid the agent at a time when the plaintiff (the vendor) still gave credit to the agents, and knew of no one else; the Court held that, after that, it was too late for the vendor to recover against the undisclosed principal. It is to be observed, however, that the agents here were commission merchants, not brokers. If they had been the latter, the vendor would not have supposed he was contracting with principals. The opinion, however, of *Parke, B.*, is approved by the Court of Appeal in the more recent cases of *Irvine v. Watson (g)* and *Davison v. Donaldson (h)*; so that it seems necessary in order to deprive the seller of his right of election that there should have been some conduct on his part which caused the settlement between the principal and his agent; in which case it would be obviously unjust that the seller should have recourse to the principal.

An agent making and signing a contract as such would in general, in the absence of a custom to the contrary, not be liable or entitled to sue upon it (*i*). [*453] Yet, "in every contract, if the agent *chooses to make himself a contracting party, the other contracting party may either sue the agent who has himself contracted, though on behalf of another, or he may sue the principal who has contracted through his

(g) 5 Q. B. D. 414, affirming the decision of *Bowen, J.*, *Ib.* 102; 49 L. J. Q. B. 531, 539. In this case the agents were brokers.

(h) 9 Q. B. D. 623.

(i) *Fleet v. Murton*, L. R. 7 Q. B. 129, 41 L. J. (Q. B.) 49; *Fisher v. Marsh*, 6 B. & S. (118 E. C. L. R.) 416; 34 L. J. (Q. B.) 177, 178; *Hutchinson v. Tatham*, L. R. 8 C. P. 482; 42 L. J. (C. P.) 260.

agent; and this, whether the principal was known at the time or not, or whether it was or was not known that he was a principal" (*k*). And he is bound if he signs the contract in his own name without qualification unless it is apparent from other portions of the document that he did not intend to sign as principal; but in order to protect the agent who so signs, a mere description of him in the body of the document as agent for another, even if that other is named, is not sufficient (*l*). Where in such a case the agent is liable, so also he has a right to sue (*m*).¹

The law of agency derives much illustration from cases decided upon partnership contracts, for "all questions between partners," as expressed by *Parke*, B., in the case of *Beckham v. Drake* (*n*), "are no more than illustrations of the same questions as between principal and agent." It is thought, therefore, that some leading principles of *the law of contracts, as it re- [*454] spects this species of agency, may be useful here, as further illustrating what has been said before, and also as giving some insight into that important head of law to which it directly pertains.

Partnership is the result of a contract whereby two or more persons agree to combine property or labour for the purpose of a common undertaking, and the acquisition of a common profit (*o*). One party may contribute all the money, or all the stock, or all the labour neces-

(*k*) Per *Blackburn*, J., in *Christoffersen v. Hansen*, L. R. 7 Q. B., at p. 513; 41 L. J. (Q. B.) 218.

(*l*) *Paice v. Walker*, L. R. 5 Ex. 173; 38 L. J. (Ex.) 109; *Hough v. Manzanos*, 4 Ex. Div. 104; 48 L. J. (Q. B., etc.) 398; and the notes to *Thomson v. Davenport*, 2 Smith's L. C. 400, 8th edit.

(*m*) *Fisher v. Marsh*, *supra*.

(*n*) 9 M. & W. 98.

(*o*) Smith's Merc. Law, 9th edit., by Dowdeswell, p. 19.

¹ See American note to *Thomson v. Davenport*, 2 Sm. L. C., 8th ed., 398.

sary for the purposes of the firm. But, in order to make people liable as partners to each other, it is necessary that there should be a community of profits (*p*), although one of them may stipulate to be indemnified against loss (*q*). This, however, respects their mutual claims, for, however they may stipulate with each other, all who authorize the business to be carried on (*r*), and all who allow themselves to be described and held out as partners, are liable as such to those to whom they have so held themselves out (*s*). It was formerly thought that the taking a share in the profits by itself rendered such a *participator liable *quoad* third persons, but it is now settled that that is not so. [*455] "The real test of the liability of any one to third parties as a copartner is, whether or not the other person or persons conducting the business were his agents to carry it on. This was decided by the unanimous judgment of the House of Lords in *Wheatcroft and Cox v. Hickman* (*t*) overruling the authorities to the contrary, and reversing the decision in the same case of the Common Pleas and of the Exchequer Chamber" (*u*). Still the participation of profits is in general a sufficiently accurate test and the right of participation in profits affords cogent, often conclusive, evidence of a partnership (*v*).

Supposing then the parties to have become partners,

(*p*) *Hoare v. Dawes*, 1 Doug. 371.

(*q*) *Bond v. Pittard*, 3 M. & W. 357; *Hickman v. Cox*, 25 L. J. (C. P.) 277; 18 C. B. (86 E. C. L. R.) 617.

(*r*) *Wheatcroft and Cox v. Hickman*, 9 C. B. N. S. (99 E. C. L. R.) 47; 8 H. of L. C. 268; 30 L. J. (C. P.) 125.

(*s*) *Dickenson v. Valpy*, 10 B. & C. (21 E. C. L. R.) 140; *Fox v. Clifton*, 6 Bing. (19 E. C. L. R.) 793.

(*t*) *Supra*, note (*r*).

(*u*) Note to *Waugh v. Carver*, 1 Smith, L. C., p. 926, 8th edit.

(*v*) See per Lord *Cranworth* in *Cox v. Hickman*, 9 C. B. N. S. (99 E. C. L. R.) 47, 92; 8 H. of L. C. 268, 306; 30 L. J. C. P. 125, 139. See also per *Thesiger*, L. J., in *Ex parte Delhasse*, *In re Megevand*, 7 Ch. Div. 511, 529.

the result is that each individual partner constitutes the others his agents for the purposes of entering into all contracts for him within the scope of the partnership concern, and, consequently, that he is liable to the performance of all such contracts in the same manner as if entered into personally by himself (*x*). It follows at once, that in general no new member can be *introduced into the partnership without the consent of all the partners (*y*); for to do so would be for an agent to appoint an agent in the matter of the agency, which, as we have seen, cannot in general be done. It follows, also, from the same principle, that where there is no specific authority, the individual members will be liable upon the partnership contracts, or not, according as the contract is in the ordinary course of the partnership business or not.¹ Thus, it has been held, that one

(*x*) *Fox v. Clifton*, 6 Bing. (19 E. C. L. R.) 776, 792; *Hawtayne v. Bourne*, 7 M. & W. 595.

(*y*) *M'Neill v. Reid*, 9 Bing. (23 E. C. L. R.) 68.

¹ Thus, a partner cannot bind the firm by a submission to arbitration or by a confession of judgment: *Adams v. Bankart*, *supra*; *Karthauss v. Ferrer*, 1 Pet. 222; *Barlow v. Reno*, 1 Blackf. 252; *Grazebrook v. McCreddie*, 9 Wend. 437; *Harper v. Fox*, 7 W. & S. 142; "because it would bind the persons and separate estates of the members, and thus transcend the limits of partnership authority;" nor can one partner give a separate creditor an order on a debtor of the firm: *McKinney v. Bright*, 16 Pa. St. 399; or otherwise apply partnership effects to the payment of his own debts: *Yale v. Yale*, 13 Conn. 185; *Rogers v. Batchelor*, 12 Pet. 230; *Livingston v. Hastie*, 2 Cai. 249; *Moddewell v. Keever*, 8 W. & S. 63; *Dob v. Halsey*, 16 Johns. 34; *Langan v. Hewett*, 13 Sm. & M. 122.

As a general rule, nothing is better settled than that the general power of a partner does not extend so far as to enable him to bind the firm by a specialty: *Van Deusen v. Blum*, 18 Pick. 229; *Clement v. Brush*, 3 Johns. Cas. 180; *Cummins v. Cassily*, 5 B. Mons. 74; *Posey v. Bullitt*, 1 Blackf. 99; though if the instrument were executed in the presence of and by the direction of his copartner, it would be the deed of both: *Ball v. Dunsterville*, 4 T. R. 313; *Overton v. Tozer*, 7 Watts, 331; *Ludlow v. Simond*, 2 Cai. Cas. 1, 42, 55; *Mackay v. Bloodgood*, 9 Johns. 285; *Henderson v. Barbee*, 6 Blackf. 26, 28. But in *Gram v. Seton*, 1 Hall, 262 and *Cady v. Shepherd*, 11 Pick. 400, it was determined, after much consideration of all the authorities, that a partner

partner has no implied authority to bind his copartner by a submission to arbitration (z), or by a guaranty (a)

(z) *Adams v. Bankart*, 1 C. M. & R. 681.

(a) *Brettel v. Williams*, 4 Exch. 623.

may bind his copartner by a contract under seal, in the name and for the use of the firm, in the course of the copartnership business, provided the other partner assents to the contract previously to its execution, or afterwards ratifies and adopts it, and this assent or adoption may be by parol, and such a conclusion is perhaps now sustained by the weight of authority: *Pike v. Bacon*, 21 Me. 280; *Swan v. Stedman*, 4 Metc. 548; *Bond v. Aitkin*, 6 W. & S. 165; *Lucas v. Sanders*, 1 McMull. 311; *Fleming v. Dunbar*, 2 Hill (S. C.) 532; *McCart v. Lewis*, 2 B. Mon. 267; *Davis v. Burton*, 4 Ill. 41; *Hatch v. Crawford*, 2 Port. 54.

It has moreover been determined that if the act of one partner be a good and valid act in itself, it will not be rendered the less so if done by a specialty, provided the seal do not vary the liability: *Deckard v. Case*, 5 Watts, 22; *Henessy v. Western Bank*, 6 W. & S. 301; *Tapley v. Butterfield*, 1 Metc. 515; which cases, and many others upon the subject of the power of a partner to bind the firm, the student will find classified in the note to *Livingston v. Roosevelt*, 1 Am. L. C. 460.—r.

See farther, on the extent of the power of one partner to bind the firm: *Rollins v. Stevens*, 31 Me. 454; *Doremus v. McCormick*, 7 Gill, 49; *Price v. Alexander*, 2 Greene, 427; *Lang v. Waring*, 17 Ala. 145; *Buchoz v. Grandjean*, 1 Mich. 367; *Mills v. Dickson*, 6 Rich. 487; *Drake v. Brander*, 8 Tex. 351. The authority of partners, active and silent, is limited to the business of the partnership: *Bell v. Faber*, 1 Grant, 31; *Cayton v. Hardy*, 27 Mo. 536; *Barnard v. Lapeer*, 6 Mich. 274; *Scott v. Bandy*, 2 Head, 197; *Boardman v. Adams*, 5 Iowa, 224; *Stockwell v. Dillingham*, 50 Me. 442; *Welles v. March*, 30 N. Y. 344.

The promise of one partner that the firm will pay the debts of a third person is not binding on his copartners; the authority of a partner over his copartners does not extend so far: *McQuewans v. Hamlin*, 35 Pa. St. 517; *Selden v. Bank*, 3 Minn. 166. Generally it is not within the scope of business to accept accommodation bills: *Mechanics' Bank v. Livingston*, 33 Barb. 458; *Bowman v. Cecil Bank*, 3 Grant, 33; nor to subscribe to the stock of a corporation: *Livingston v. Pittsburgh R. R. Co.*, 2 Grant, 219. But see *Maltby v. Northwestern R. R. Co.*, 16 Md. 422. A partner binds his firm only on the theory of an implied agency for the purposes of the mutual adventure, and the agency does not extend beyond what may be fairly regarded as coming within its reach: *Hotchin v. Kent*, 8 Mich. 526; *Loudon Society v. Hagerstown Bank*, 36 Pa. St. 498. A contract creating, in fact, a new partnership between two different firms, though both engaged in the same business, cannot be made on behalf of either firm by a single member thereof, but requires the consent of all the members: *Buckingham v. Hanna*, 20 Ind. 110. As to the power of one partner to bind the firm by a promissory note: *Gray v. Ward*, 18 Ill. 32; *Kimbro v. Bullitt*, 22 How. 256; *Dow v. Phillips*, 24 Ill. 249.—s.

respecting the matters of the partnership: for it is clear that such power does not arise out of the relation of partnership, and is not, therefore, to be inferred from it; and, where it is relied upon, it must, like every other authority, be proved either by express evidence, or by such circumstances as lead to the presumption of such an authority having been conferred. Thus, also, in *Hasleham v. Young* (*b*), where persons were in partnership as attorneys, and one of them gave an undertaking, that, in consideration that the plaintiff in an action would discharge the defendant in that action, who was in custody under an execution therein, they, the attorneys, would pay the plaintiff *the debt and costs on a certain day, and he [*457] signed it with the partnership name: the Court considered it a very clear case that the guaranty was not given in the usual course of business, and no authority being shown, that the firm was not liable. There is nothing, however, to prevent the parties from confining the credit to an individual partner; and it is a question for the jury whether this has or has not been done. Where there has been nothing to discharge a partner from his liability, or to rebut the presumption of authority to pledge his credit arising from the mere fact of his being a partner, he is clearly liable; but where there are facts to show that it was the intent of the contracting parties to restrict the credit to one of several partners, the liability is limited by such intent. Cases of this description occur where the partner represents himself as the only person composing the firm. Thus, in *De Mautort v. Saunders* (*c*), *Saunders* (not the defendant) and *Wiehe* drew a bill at the Mauritius on *Saunders Brothers* (the defendants)

(*b*) 5 Q. B. (48 E. C. L. R.) 833.

(*c*) 1 B. & Ad. (20 E. C. L. R.) 398.

in London, payable to Bougier, who endorsed it to the plaintiff, and the defendants accepted the bill. On being sued upon it they set up as a defence that they were in partnership with Wiehe & Saunders and were liable jointly with them. The Court held, that the verdict, which was for the plaintiff, was proper, and [*458] *observed, that it was for the jury to say whether the plaintiff, when he took the bill, had any reason to know that Wiehe & Saunders were partners in the house in London on which the bill was drawn. It was incumbent on the defendants to show that the plaintiff had trusted the other two; for, if a person contract with two other persons, knowing them alone in the transactions, he may sue them only. If, indeed, after the contract be made, he discover that they had a secret partner who had an interest in the contract, he is at liberty to sue that secret partner jointly with them, but he is not bound so to do. On the other hand, where an action was brought for the price of coals delivered to the defendant under the name of Bush & Co., it appeared that for some time before the coals were ordered the partnership consisted of Bush and the defendant, R. Smith; that, on Bush's death, before the coals were supplied, W. Smith became a partner with defendant, and so continued, but they carried on their trade under the old name of Bush & Co.; and that W. Smith had not ordered the coals: it was contended, that W. Smith should have been sued conjointly with the defendant. The Court decided that, the partnership having been fully proved, the defendant would not be liable singly unless he led the plaintiff to believe that he alone constituted the [*459] firm of Bush & Co. (d). *"If," said Lord Abinger, C. B., in the case just cited, "a person,

(d) *Bonfield v. Smith*, 12 M. & W. 405.

contracting with another for goods, delivers an invoice made out to a firm, and nothing is said as to the persons composing it, he takes his chance who are the partners in that firm. If, indeed, the party represents himself as the only person composing the firm, an action may be brought against him alone; or if, on being asked who his partners are, he refused to give any information, that might be evidence for the jury to say whether he did not hold himself out as solely liable."

The result is, that the liability arising from the naked fact of partnership is *primâ facie* the liability of all the partners, but that may be rebutted by direct evidence that credit was not given to the partnership, but to an individual member of it (*e*). This doctrine is very strongly corroborated by the case of *Holcroft v. Hoggins* (*f*). The plaintiff had been engaged to write articles in the *Newcastle Advertiser*, by a person who, at the time of the contract, had become in fact the sole proprietor of the newspaper, and the two defendants were sought to be made liable, in consequence of their having suffered their names to remain as registered proprietors of the newspaper, in the declaration. [*460] *required to be filed by 6 & 7 Will. IV., c. 76, they having previously been proprietors of the newspaper, but having ceased to be so before the contract was entered into. It was adjudged that not only were the defendants not liable, but that the fact of their being co-proprietors was immaterial, though they had held themselves out as such, if it were shown that another partner contracted with the plaintiff in such a manner that credit was given to him and not to them. And

(*e*) *Ante*, p. *457; *Peacock v. Peacock*, 2 Camp. 45; *Beckham v. Knight*, 4 Bing. N. C. (33 E. C. L. R.) 243; 1 M. & Gr. (39 E. C. L. R.) 738, Exch. Ch.; *Brett v. Beckwith*, 26 L. J. (Ch.) 130.

(*f*) 2 C. B. (52 E. C. L. R.) 488; 15 L. J. (C. P.) 129, S. C.

the Court thought that the evidence was, that the contract was made by the sole proprietor, upon his own sole responsibility, and not upon that of the defendants. It was true that, on the register at the stamp-office, they held themselves out as proprietors, and if it had been shown that the plaintiff was thereby induced to enter into the contract, they might have been liable.

It must also be shown that the debt for which an action is brought accrued during the time the party sued was actually in partnership. He will be liable neither for contracts made before he became a partner (*g*), nor after he ceases to be one (*h*), provided he gives proper notice of his retirement (*i*).

[*461] *It has been long held that dormant partners are equally liable with ostensible partners upon all contracts made for the firm during their partnership; on the principle, not perhaps very satisfactory, that the dormant partner, being entitled to all the profits of the contract made by the firm to which he belongs, ought also to share in the liability; and that having a right moreover to sue others on it (*k*), he ought not to be protected from being sued on it by them: for "*Qui sentit commodum sentire debet et onus.*" It is therefore decided that, as an undisclosed principal may be liable as soon as he is discovered, subject to all the equities between the parties, so may an undisclosed partner: and he may be made liable on a written contract not under seal, to which he is not expressly a

(*g*) Vere v. Ashby, 10 B. & C. (21 E. C. L. R.) 288; Battley v. Lewis, 1 M. & Gr. (39 E. C. L. R.) 155; Beale v. Moulds, 10 Q. B. (59 E. C. L. R.) 976; Whitehead v. Barron, 2 M. & Rob. 248.

(*h*) Heath v. Sanson, 4 B. & Ad. (24 E. C. L. R.) 172.

(*i*) Parkin v. Carruthers, 3 Esp. 248; Williams v. Keats, 2 Stark. (3 E. C. L. R.) 290; Dolman v. Orchard, 2 Car. & P. (12 E. C. L. R.) 104; Moorsom v. Bell, 2 Camp. 616.

(*k*) Robson v. Drummond, 2 B. & Ad. (22 E. C. L. R.) 308.

party, if it be made out that he is a party to it in point of law, and that he has authorized the other partners to sign it on his behalf (*l*).

Nominal partners are as liable as dormant ones, not because they are principals for whom others are agents, but on the ground that credit has been given to them, and it is just to the creditor that they should be responsible for the result of so holding themselves out to the world. Indeed, it would be highly prejudicial to commerce to allow *a wealthy man by the loan [**462*] of his name, to give other persons a fictitious credit in the world, and then refuse to satisfy creditors who had made their advances upon the faith of his apparent responsibility (*m*). But the claims for which a partner merely nominal is liable, must arise out of credit really given to the fact that he was a partner when the credit was given. The jury must be satisfied that the plaintiff *bonâ fide* believed that the partner sought to be charged was really such (*n*).

A general notice is sufficient to discharge partners who retire from firms as regards the world at large; but an express notice is requisite to discharge them as regards previous customers. This being given, the retiring partner is effectually discharged from all debts subsequently accruing; nor can he be made liable by any unauthorized use of his name by his previous partners (*o*), though his liability, as well as his power to make admissions, or to release or sue for debts contracted during his partnership, of course remains.

(*l*) *Beckham v. Drake*, 9 M. & W. 79; 11 M. & W. 315, in Exch. Ch.

(*m*) *Waugh v. Carver*, 2 H. Bl. 235; 1 Smith L. C. 908, 8th edit.

(*n*) *Dickenson v. Valpy*, 10 B. & C. (21 E. C. L. R.) 128; *Lake v. Duke of Argyll*, 6 Q. B. (51 E. C. L. R.) 477; *Wood v. Duke of Argyll*, 6 M. & G. (46 E. C. L. R.) 928.

(*o*) *Abel v. Sutton*, 3 Esp. 108.

In *Farrar v. Deffinne* (*p*), the defendant had been a dormant partner, but ceased to be so before [*463] *the debts accrued for which the action was brought. The plaintiff had known of the partnership, but the dissolution not having been advertised, he had no knowledge of it. Mr. Justice *Cresswell* said, in summing up the case: "The law stands thus: if there had been a notorious partnership, but no notice had been given of the dissolution thereof, the defendant would have been liable. If there had been a general notice, that would have been sufficient *for all but actual customers*; these, however, must have had some kind of actual notice. If the partnership had remained profoundly secret, the defendant could not have been affected by transactions which took place after he had retired; but if the partnership had become known to any person or persons, he would be in the same situation *as to all such persons*, as if the existence of the partnership had been notorious."

Where bills are drawn by partners in trade, the general authority implied by the custom of merchants binds each partner; but not so where the partnership is not of a commercial nature, such as that of attorneys, for instance, in which case it must be shown that the party accepting or drawing had special authority to do so, even where it is done in the name of the firm (*q*). Where one partner signs for the firm, being authorized to do so, and describes himself as signing for the firm, he is not separately liable, but the firm alone (*r*). If he accepts, professing to have authority

(*p*) 1 Car. & K. (47 E. C. L. R.) 580.

(*q*) *Hedley v. Bainbridge*, 3 Q. B. (43 E. C. L. R.) 316; *Levy v. Pyne*, 1 Car. & M. (41 E. C. L. R.) 453.

(*r*) *Ex parte Buckley, In re Clarke*, 14 M. & W. 469, overruling *Hall v. Smith*, 1 B. & C. (8 E. C. L. R.) 407.

which he has not, a bill addressed to the firm, he makes himself liable thereby (s).

It will be concluded from the nature of partnership authority, that partners are not liable for the fraudulent contracts of a copartner, if they can prove the knowledge of the fraud by the plaintiff (t). Neither are they bound where an express warning was given to the plaintiff by the partners sought to be charged.

There are two other classes of agents so commonly employed, and that upon business so important, that a few propositions of law respecting them will be useful; these are brokers and factors. Factors are entrusted with the possession of the property they are to dispose of; brokers are entrusted with the disposal, but not with the possession (u).¹ The latter, therefore, are mere middle men between the two parties contracting, and *cannot sue in their own name upon contracts made by them as brokers (x). Neither are they [*465] in general liable upon contracts so made; although they may be made so where there is an usage in the particular trade to make the broker, though contracting as

(s) *Owen v. Van Uster*, 10 C. B. (70 E. C. L. R.) 318; 20 L. J. (C. P.) 61, S. C.; *Nicholls v. Diamond*, 23 L. J. (Ex.) 1; 9 Ex. 154, S. C.

(t) *Musgrave v. Drake*, 5 Q. B. (48 E. C. L. R.) 185.

(u) "A broker for sale is a person making it a trade to find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them." Blackburn on the Contract of Sale, p. 81.

(x) *Fairlie v. Fenton*, L. R. 5 Ex. 169, 39 L. J. (Ex.) 107. As to the distinction when the signature is followed by the words "as brokers," and where it is followed by the words "brokers" only, see *Hutcheson v. Eaton*, 13 Q. B. D. 861.

¹ Hence a broker has no implied authority to accept payment for the goods, and the general rule is that such a payment is not a discharge and cannot be set up as a defence to an action by the principal for the price. Of course the existence of circumstances showing implied assent of the principal that the broker shall receive payment will bind him. See *Kymer v. Suwercroft*, *supra*, p. *447; *Irwine v. Watson*, 5 Q. B. D. 102, 414; *Whiton v. Spring*, 74 N. Y. 169; *Putnam v. French*, 53 Vt. 402.

such, personally liable, in the event of his not disclosing the name of his principal (*y*). And evidence of such usage is admissible, even though the contract of sale be in writing. The contract between the parties employing the broker is the contract of employment, and not the contract of sale, and the custom is attached to the employment (*z*). Brokers, by force of the stat. 6 Ann., c. 16, cannot practise in London without being admitted by the Mayor and Aldermen, when they take an oath, and formerly entered into a bond for the observance of certain regulations (*a*). We have *seen (*b*) that [*466] a person acting as a broker in London without being duly qualified, cannot recover compensation (*c*). Brokerage relates to goods and money, and not to contracts for labour (*d*); therefore, a stock broker is within the statute (*e*), but not a ship-broker (*f*), or an auctioneer (*g*), or one who procures and hires persons to work for another, in surveying lines of railway (*h*).

(*y*) *Fleet v. Murton*, L. R. 7 Q. B. 126, 41 L. J. (Q. B.) 49; and see *ante*, p. *452.

(*z*) *Fleet v. Murton*, *supra*, at pp. 128, 133, L. R., at p. 51, L. J. See also *Humfrey v. Dale*, 7 E. & B. (90 E. C. L. R.) 266, 26 L. J. (Q. B.) 137; *S. C.* in Exch. Ch., E. B. & E. (96 E. C. L. R.) 1004, 27 L. J. (Q. B.) 390; *Hutchinson v. Tatham*, L. R. 8 C. P. 482; 42 L. J. (C. P.) 260.

(*a*) *Kemble v. Atkins*, Holt N. P. (3 E. C. L. R.) 427; 6 Anne, c. 16; 57 Geo. 3, c. lx.; 10 Anne, c. 19, s. 121. The Mayor and Aldermen have no longer any power to require a bond. 33 & 34 Vict., c. 60 (London Brokers Relief Act, 1870), s. 2. But after the 29th of Sept., 1886, the admission of brokers by the Court of Mayor and Aldermen is rendered no longer necessary by 47 & 48 Vict., c. 3 (London Brokers Relief Act, 1884), s. 2. See *ante*, p. *252, n. (*m*).

(*b*) *Ante*, p. *252.

(*c*) *Cope v. Rowlands*, 2 M. & W. 149; *Smith v. Lindo*, 27 L. J. (C. P.) 196; 4 C. B. (N. S.) (93 E. C. L. R.) 395; 5 C. B. (N. S.) (94 E. C. L. R.) 587 in Exch. Ch.

(*d*) *Milford v. Hughes*, 16 M. & W. 174.

(*e*) *Clarke v. Powell*, 4 B. & Ad. (24 E. C. L. R.) 846.

(*f*) *Gibbons v. Rule*, 4 Bing. (13 E. C. L. R.) 301.

(*g*) *Wilkes v. Ellis*, 2 H. Bl. 555.

(*h*) *Milford v. Hughes*, *supra*.

Where brokers keep a book and enter in it and sign all contracts made by them, which in London they were required to do by their bond (*i*), then this entry, so signed by the broker who has negotiated the sale and purchase of goods, would constitute the binding contract between the parties (*k*), whose agent for making it the broker is (*l*). But in practice the bought and sold notes, which are memoranda of the purchase and sale, signed by the broker, and sent to the parties, are considered as constituting the complete proof of the contract. *In strictness, however, it seems that they do not [*467] constitute the contract (*m*).

A remarkable variation from the usual course of business obtains in the case of insurance brokers. By these persons subscriptions to a policy of assurance are almost always procured; to them the underwriters look for the premium of insurance, and to them the assured pay the premiums. This is clearly explained in the following extract from the judgment of *Bayley, J.*, in *Power v. Butcher* (*n*):—"According to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But, as between the assured and the underwriter, the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middle man between the assured and the underwriter; but he is not solely agent

(*i*) *Kemble v. Atkins*, *supra*.

(*k*) *Sievewright v. Archibald*, 20 L. J. (Q. B.) 529; 17 Q. B. (79 E. C. L. R.) 104, *S. C.*; *Humfrey v. Dale*, 27 L. J. (Q. B.) 390, in *Exch. Ch.*

(*l*) *Hinde v. Whitehouse*, 7 East, 558; *Goom v. Afalo*, 6 B. & C. (13 E. C. L. R.) 117.

(*m*) See Benjamin on Sales, 255, 3rd edit.

(*n*) 10 B. & C. (21 E. C. L. R.) 339.

—he is a principal to receive the money from the assured, and to pay it to the underwriter.”

As to the mode in which, in the event of a loss, the payment is made to the assured, the brokers usually settle and adjust the loss, and receive the payment. It [*468] is a frequent custom to make *settlements in account between the broker and the underwriter; and it is clear that if the assured have known, or ought, in the common course of things, to have known of such a custom, they will be bound by it although money has not been actually paid by the underwriter; such a settlement in account with the broker by the underwriter discharging the latter as between himself and the assured. This was decided in *Stewart v. Aberdeen* (o); but the Court added, in delivering its judgment, “It must not be considered, that, by this decision, the Court means to overrule any case deciding that where a principal employs an agent to receive money, and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor, by a set-off in account with him (p). But the Court is of opinion that, where an insurance broker or other mercantile agent has been employed to receive money for another, in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums [*469] which he may have received by *credits in account with the debtors, with whom he also keeps running accounts, and not merely with moneys

(o) 4 M. & W. 211.

(p) *Underwood v. Nicholls*, 25 L. J. (C. P.) 79; 17 C. B. (84 E. C. L. R.) 239; *Guardians of Bedford Union v. Pattison*, 26 L. J. (Ex.) 115; 1 H. & N. 523, in Ex. Ch.; *Ex parte Barkworth v. Harrison*, 27 L. J. (Bptey.) 5; *Sweeting v. Pearce*, 29 L. J. (C. P.) 265; *Perry v. Hall*, 29 L. J. Ch. 677; *Catterall v. Hindle*, L. R. 1 C. P. 186, 2 C. P. 368 (Ex. Ch.) 35 L. J. (C. P.) 161.

actually received, the rule laid down in those cases cannot properly be applied; but it must be understood that where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention and with the authority of the principal." But the necessity of this knowledge in the principal in order to render such a settlement in account equivalent to a settlement according to the express authority of the principal, has been strongly illustrated in a later case, in which even a usage at Lloyd's to this effect was held insufficient to give authority to the agent where there was proof that the principal was ignorant of it (*q*).

These few propositions, it is hoped, will enable you more readily to understand those cases of the law of principal and agent, where the latter is a broker, and where the general rules do not, therefore, seem directly applicable without reference to these peculiarities.

A factor is an agent employed to sell goods or merchandise, consigned or delivered to him by or for his principal, for a compensation, commonly called factorage or commission. Hence he is often called *a [470] commission agent or commission merchant (*r*). He "is an agent but an agent of a particular kind.¹ He is an agent entrusted with the possession of goods for the purpose of sale" (*s*). Since then the usual

(*q*) *Sweeting v. Pearce*, *supra*; 30 L. J. (C. P.) 110, *S. C.* in Ex. Ch.

(*r*) See *Story* on Agency, s. 34.

(*s*) Per *Cotton*, L. J., in *Stevens v. Biller*, 25 Ch. Div. 31, 37; 53 L. J. (Ch.) 249, 252.

¹ Factors are to be treated as special owners of the property consigned to them. They may sue in their own names for the price of goods sold—may receive payments—and give receipts, unless notice to the contrary has been given by their principals: *Graham v. Duckwall*, 8 Bush, 12.—s.

course of his employment is to sell, if he does sell, though contrary to the instructions, whether implied or express, of his principal the true owner, the sale is binding on the latter, provided of course that the purchaser acts *bonâ fide*, and is ignorant that the factor is in fact unauthorized to sell (*t*). This is in accordance with "the general principle of law, that, where the true owner has clothed any one with apparent authority to act as his agent, he is bound to those who deal with the apparent agent on the assumption that he really is an agent with that authority, to the same extent as if the apparent authority was real" (*u*). This is really the same principle which we have already been discussing in the last lecture, when we were considering the liability of a principal for the unauthorized acts of a general agent within the scope of his usual employment (*x*).

[*471] *It has, however, long been the practice for the factor not merely to sell the goods when they come into his possession, but also to make advances to the owner on the security of them, or incur liability by accepting bills drawn by the owner on him against the cargo consigned to him, as the expression is, *i. e.*, on the security of the cargo, the owner thus getting paid a portion of the price before the goods or merchandise are actually sold. Now, if the factor thus makes advances or incurs liability by his acceptances, it may often be a great advantage to him when he has the control of the goods, either by having actually received them, or having the documents of title (*y*) to them in

(*t*) *Pickering v. Busk*, 15 East, 38; *Stevens v. Biller*, 25 Ch. Div. 31; 53 L. J. (Ch.) 249.

(*u*) Per *Blackburn, J.*, in *Cole v. North Western Bank*, L. R. 10 C. P. 364; 44 L. J. (C. P.) 237.

(*x*) *Ante*, p. *414.

(*y*) Such as the bill of lading, dock warrant, or other order for the delivery of goods.

his possession, in turn to pledge them to some third party, either to repay himself or to put himself in funds to meet the bills as they become due. This, however, by the Common Law he could not do; for though the Courts held that the unauthorized *sale* by a factor was nevertheless binding on his principal, by reason of there being an implied authority to sell, as that was the factor's usual employment, yet they refused to hold that there was any implied authority to *pledge*, as that was no part of his usual employment as factor. Indeed so long ago as somewhere about the year 1742, in the case of *Paterson v. Tash* (z), it was *laid down that though a factor had power to [*472] sell, and therefore bind his principal, yet he could not bind or affect the property of the goods by pledging them as a security for his own debt, *i. e.*, the debt due from the factor to the pledgee. Indeed, in *M'Combie v. Davies* (a), "the decision went so far as to hold that a pledge by a factor was so wholly tortious as not even to transfer the lien which the factor himself had" (b), *i. e.*, he could not pledge the goods so as to repay himself even his own advances to his principal.

This state of the law it was thought expedient to alter, in the interests of commerce, in favour of persons making *bonâ fide* advances to those who had the possession of the property, or who held the symbols of the property in the apparent character of true owners of it. Accordingly, a series of statutes called the Factors' Acts has been passed, by which and by the Common Law already described, contracts made with factors are now regulated. These (and the rule

(z) 2 Strange, 1178. This was a ruling at *nisi prius*. See, too, *Martini v. Coles*, 1 M. & S. 140; *Shipley v. Kymer*, Ib. 484.

(a) 7 East, 5.

(b) Per *Blackburn, J.*, in *Cole v. North Western Bank*, L. R. 10 C. P. 364; 44 L. J. (C. P.) 237.

applies to all instances of statute law) must be studied in their very words, although a general sketch of their effect is attempted here. The first of these statutes is 4 Geo. IV., c. 83; this was altered and amended by 6 Geo. IV., c. 94; and both have received amendment by [*473] the 5 & 6 Vict., *c. 39. Their scope has been enlarged and some defects in the law remedied by 40 & 41 Vict., c. 39, the last of the series. The following very succinct description of the effect of the three first of these statutes is extracted from a work of the greatest utility and accuracy, Chitty's Collection of Statutes of Practical Utility (c):—"First, where goods, or documents for the delivery of goods, are pledged as a security for present or future advances, with the knowledge that they are not the property of the factor, but without notice that he is acting without authority, in such a case the pledgee acquires an absolute lien. Secondly, where the goods are pledged by a factor without notice to the pledgee that they are the property of another, as a security for a pre-existing debt, in that case the pledgee acquires the same right as the factor had. Thirdly, where a contract to pledge is made in consideration of the delivery of other goods or documents of title, upon which the persons delivering them up had a lien for a previous advance (which is deemed to be a contract for a present advance), in that case, the pledgee acquires an absolute lien to the extent of the value of the goods given up." It is to be observed that the persons whose dealings with property or documents in their possession are within the protection of these earlier statutes, are persons entrusted [*474] therewith as factors or agents (d), not

(c) Vol. 2, p. 1082, 4th edit., by Lely.

(d) *Jenkyns v. Osborne*, 7 M. & Gr. (49 E. C. L. R.) 678; *Van Casteel v. Booker*, 2 Exch. 691; *Kingsford v. Merry*, 26 L. J. (Ex.) 83; 1 H. & N. 503, in Exch. Ch.

persons to whose employment a power of sale is not commonly incident, as wharfingers (*e*), or warehouse keepers (*f*), and that the transactions which are within the statutes are mercantile transactions (*g*).

Thus, where advances were made upon the security of furniture used in a furnished house, not in the way of trade, to the apparent owner of such furniture, such apparent owner afterwards appearing to be the agent entrusted with the custody of the furniture by the true owner, the case was held not to be within the meaning of the Factors' Acts, such agent not being an agent, nor such furniture, goods, and merchandise, within the *meaning of any of them (*h*). Moreover, be- [*475]
fore the passing of 40 & 41 Vict., c. 39 (the Factors' Act, 1877), it was held in a recent case (*i*) that the person who was to create a pledge of his principal's goods valid within the protection of the three first statutes, must be an agent who was entrusted at the time of the making the pledge. Therefore, where a person who had been an agent to sell certain goods, but whose authority was revoked, wrongfully retained the goods after the revocation and demand for the goods from the principal, and then pledged them for an advance made *bond fide* and in ignorance that the pos-

(*e*) *Monk v. Whittenbury*, 2 B. & Ad. (22 E. C. L. R.) 484.

(*f*) *Cole v. North Western Bank*, L. R. 9 C. P. 470, 43 L. J. (C. P.) 194, affirmed in Ex. Ch., L. R. 10 C. P. 354, 44 L. J. (C. P.) 233.

(*g*) *Wood v. Rowcliffe*, 6 Hare, 191. See, also, *Baines v. Swainson*, 4 B. & S. 270, 32 L. J. Q. B. 281, "the case of the commission agent, who informed the owners of goods that he had an opportunity of selling them, and having got samples, represented that he had sold the goods to a person who it was afterwards discovered had no existence, and having by that fraud got possession of the goods, pledged them to a third person, who made an advance *bond fide* and without knowledge of the fraud; and it was held that the latter acquired a good title to the goods under the Factors' Acts." Per *Willes, J.*, in *Fuentes v. Montis*, L. R. 3 C. P., p. 279.

(*h*) *Wood v. Rowcliffe*, *supra*.

(*i*) *Fuentes v. Montis*, L. R. 3 C. P. 268, 4 C. P. 93; 37 L. J. (C. P.) 137, 38 Ib. 95.

session was that of an agent, it was held that the pledger was not an agent at all but a wrongdoer, and not within the Acts, and that the pledge was not a transaction within their protection. This case, therefore, decided that a secret revocation of the agent's power would defeat the rights of *bonâ fide* pledgees (*k*).

The case, however, which seems to have led immediately to the changes of the law produced by 40 & 41 Vict., c. 39, is *Johnson v. Credit Lyonnais Co.* (*l*), the facts in which were as follows: One Hoffmann, a broker [*476] in the tobacco trade, but who *also dealt in tobacco as an importing merchant, having imported a quantity of that article, left it in bond in the warehouses of the St. Katherine's Dock Company, receiving the usual dock warrants; and the tobacco was entered in the books of the Company as that of Hoffmann. This tobacco Hoffmann sold to the plaintiff, who carried on the business of a tobacco manufacturer at Bolton, in Lancashire, but it not suiting the plaintiff's purpose to take the tobacco out of bond, which would have involved the necessity of paying the duty before he wanted the tobacco, he did what it appeared was frequently, but not always, done in the tobacco trade by purchasers in order to avoid the immediate payment of the duty; he left the tobacco in bond in the name of Hoffmann, and left the dock warrants in Hoffmann's hands, and took no steps to have any change made in the books of the Dock Company as to the ownership of the goods. According to the plaintiff's statement, he was ignorant of the fact that, when goods are thus deposited in the warehouses of the Dock Company, dock warrants are issued to the party depositing which represent the goods, and are capable

(*k*) Benjamin on Sales, book v., part 1, p. 806, 3rd edit.

(*l*) L. R. 2 C. P. D. 224; 3 C. P. D. (C. A.) 32; 47 L. J. (Q. B., etc.) 241.

of being transferred so as to enable the transferee to obtain possession of the goods. Being thus the ostensible owner of the tobacco, Hoffmann fraudulently obtained advances, on the pledge of a portion of it, from the Credit Lyonnais Company, the defendants, who acted in perfect good faith under the belief, induced by his *being in possession of the goods. [*477] and of the indicia of ownership, that Hoffmann was the owner of the tobacco. The defendants, on the completion of the transaction, caused the entry of the goods to be transferred from the name of Hoffmann to their own in the books of the Dock Company, and took fresh dock warrants from the Company, giving up the former ones. The transactions between Hoffmann and the defendants were wholly unknown to the plaintiff; his statement also that he was unaware of the practice of giving dock warrants as evidence of the title of the party to whom they are given, or of the transfer of such warrants on alienation of the property, does not seem to have been questioned. Upon this state of facts *Denman, J.*, gave judgment in favour of the plaintiff for the value of the tobacco pledged to the defendants; and on appeal that judgment was affirmed. The Court of Appeal held (*m*) that Hoffmann was not entrusted by the plaintiff as his factor or agent with the documents of title within the meaning of the then existing Factors' Acts; and also that the plaintiff's conduct in leaving the indicia of title in Hoffmann's hands was not such as to disentitle him to recover the value of the tobacco from the defendants. After, however, the decision of *Denman, J.*, and before the appeal, the statute 40 & 41 Vict., c. 39, was passed (on the *10th [*478] of August, 1877), which alters the law in some material particulars.

(*m*) 3 C. P. D. 32, 47 L. J. (Q. B., etc.) 241.

That Act, after reciting that “doubts have arisen with respect to the true meaning of certain provisions of the Factors’ Acts, and it is expedient to remove such doubts and otherwise to amend the said Acts, for the better security of persons buying or making advances on goods, or documents of title to goods, in the usual and ordinary course of mercantile business;” enacts as follows :

- “(1.) In this Act, the expression ‘the principal Acts’ means the following Acts ; that is to say,
 The Act of the 4th Geo. IV. (1823), c. 83.
 The Act of the 6th Geo. IV. (1825), c. 94.
 The Act of the 5th and 6th of Her Majesty
 (1842), c. 39.

And the said Acts and this Act may be cited for all purposes as the ‘Factors’ Acts, 1823 to 1877.’ ”

- “(2.) Where any agent or person has been entrusted with and continues in the possession of any goods, or documents of title to goods, within the meaning of the principal Acts as amended by this Act, any revocation of his entrustment or agency shall not prejudice or affect the title or rights of any other person who, without notice of such revocation, purchases such goods, or makes advances upon the faith or security of such goods or documents.”

This section applies to the state of facts in [*479] *Fuentes v. Montis (*supra*, p. *475) ; and the rights of *boná fide* pledgees or purchasers are no longer liable to be defeated by a secret revocation of the authority of the agent, in whose hands, notwithstanding the revocation, the goods or documents of title are actually remaining (*n*).

- “(3.) Where any goods have been sold, and the

(*n*) See remark in Benjamin on Sales, 2nd edit., p. 679 ; see also 3rd edit., pp. 806, 809.

vendor or any person on his behalf continues or is in possession of the documents of title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor or any person or agent entrusted by the vendor with the goods or documents within the meaning of the principal Acts as amended by this Act so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person entrusted by the vendee with the goods or documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold."

This section bears upon the state of facts in *Johnson v. Credit Lyonnais Company* (*ante*, p. *475). If this section had been in force when those facts *happened the plaintiff would have had to bear the [*480] loss, not the defendant (o).

"(4). Where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge, or disposition of such goods or documents by such vendee so in possession or by any other person or agent entrusted by the vendee with the documents within the meaning of the principal Acts as amended by this Act, shall be as valid and effectual as if such vendee or other person were an agent or person entrusted by the vendor with the documents within the meaning of the principal Acts as amended by this Act, pro-

(o) See the remarks of *Cockburn*, C. J., in *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 36, 47 L. J. (Q. B., etc.) 245.

vided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods."

This section applies to the cases of *Jenkyns v. Usborne* (*p*) and *Van Casteel v. Booker* (*q*), where it was held that pledges of documents of title by persons claiming to be owners, were not within the protection of the then Factors' Act, which applied only to the cases of persons entrusted with the documents as factors or agents.

[*481] *“(5.) Where any document of title to goods has been lawfully endorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by endorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bond fide* and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.”

This section contains a very important alteration of the law as to the right of stoppage *in transitu* (*r*). This right exists where the unpaid vendor of goods who has contracted for their sale, and delivered them to a carrier in compliance with the sale, ascertains that the vendee is insolvent before the arrival of the goods at

(*p*) 7 M. & G. (49 E. C. L. R.) 678.

(*q*) 2 Exch. 691.

(*r*) It is not within the scope of this work to enter into the subject of stoppage *in transitu* at any length. The student who desires information thereupon is referred to *Lickbarrow v. Mason*, 1 Smith L. C., p. 753, 8th edit., and to *Benjamin on Sales*, book v., part i., chap. 5, p. 815, 3rd edit.

their destination. In that case, while the goods are still *in transitu*, the vendor may stop and countermand their delivery. The doing this is called stoppage *in transitu*.

*But though the consignor may thus stop the goods before they get to the consignee, yet the [*482] latter in almost all cases of the shipment of goods receives the bill of lading of the goods before the goods arrive. Now the bill of lading is a document signed by the master of the vessel on board of which the goods are shipped acknowledging their receipt on board, and that they are deliverable to the person named therein or his assigns; and by the custom of merchants if this bill of lading is transferred by endorsement for a valuable consideration, the property in the goods passes. The bill of lading thus becomes to a considerable extent a negotiable instrument, for not only is it a symbol of value passing from hand to hand if duly transferred, but if, while the goods are on their way to their destination, the consignee assign the bill of lading to a third person for a valuable consideration given *bonâ fide*, the right of the consignor to stop the goods as against such assignee is thereby divested (*s*). This degree of negotiability, however, was never extended to other documents of title before this act; but now the right of stoppage *in transitu* may be defeated by the due transfer of any documents of title (*t*).

*“(6.) This Act shall apply only to acts done and rights acquired after the passing of this Act.” [*483]

It is not intended here to enter further into the consideration of the Factors' Acts. But you must not

(*s*) Lickbarrow v. Mason, *supra*.

(*t*) As to what the words “documents of title” embrace, see 5 & 6 Vict., c. 39, s. 4.

forget to observe that they relax the general rule of the Common Law, that a man cannot give a better title to goods than he has himself (*u*), in favour of persons who *bonâ fide* and without notice of any absence or limitation of authority in the person with whom they deal, pay or advance him money on the strength of the documents of title which he produces, or of the goods of which he is the ostensible owner (*x*). It is found on the whole fairest and most beneficial to trade that *bonâ fide* dealings on the security of goods or documents of title should be upheld rather than the title of the true owner, and that on him should fall the loss, if any, arising from the untrustworthiness of persons into whose hands the symbols of the ownership of his property have come.

Before leaving the subject of contracts by agents, I [*484] will advert to the topic which in a former lecture *I reserved for this period, that, namely of a wife's power to bind her husband by contract. Now it is a principle, as old as the time of Fitzherbert (*y*), that, whenever a wife's contract made during marriage binds the husband, it is on the ground that she entered into it as his agent.¹ Thus, where the plaintiff sold

(*u*) A somewhat similar exception we have already considered, *ante*, p. *248, where we saw that a purchaser under a contract voidable by reason of fraud may yet give a good title to an innocent purchaser for value. Both exceptions probably depend on the same principle.

(*x*) See the judgment of *Willes, J.*, in *Fuentes v. Montis*, L. R. 3 C. P. 268; 37 L. J. (C. P.) 137; and that of Lord *Blackburn*, then *Blackburn, J.*, in *Cole v. North Western Bank*, L. R. 10 C. P. 357; 44 L. J. (C. P.) 233.

(*y*) *Fitz. Nat. Brev.* 27, C.; *Ib.* 118, F.; *Ib.* 120, G

¹ *Sawyer v. Cutting*, 23 Vt. 486; *Leeds v. Vail*, 15 Pa. St. 185; *Alexander v. Miller*, 16 Ib. 215; *Burk v. Howard*, 13 Mo. 241; *Swett v. Penrice*, 24 Miss. 416. If a husband allow his wife to conduct business as a trader, he is liable on her contracts: *Godfrey v. Brooks*, 5 Harring. 396; *Cropsey v. McKinney*, 30 Barb. 47. The husband is liable for goods furnished to the wife suitable to their station in life when he has knowingly permitted the wife to retain them: *Gilman v. Andrus*, 28 Vt. 241; *Ogden v. Prentice*, 33 Barb. 160.—s.

music to a married woman living with her husband, and sued the husband for the price, and the only question left to the jury was, whether the music was necessary for the wife in her station, this was held wrong, as the question ought to have been, whether the wife had the husband's authority to purchase (z). Now, she may be appointed his agent in the same way that any other individual may, either by express words or by implication, as I have already mentioned, and you will find that illustrated by the case of *M'George v. Egan*. There the defendant's wife had put her brother's child to school with the plaintiff, and the defendant had occasionally visited the child at the school, and was in the habit of paying for a variety of articles ordered by his wife for the use of his house, and amongst them he had paid a carver and gilder's bill incurred by the wife; although it was contended that these facts afforded no inference that the defendant had authorized the [*485] *wife to incur the debt claimed by the plaintiff, the Court held, that it clearly was evidence of her having authority to contract that debt, although it was slight (a). Thus, also, where the plaintiff, in order to substantiate a demand for goods sold to the defendant, proved that he had a shop, in which his wife served and carried on the business of it in his absence, and that, on applying to her for the price of the goods, she said she would pay it if he would allow £10, which she claimed, and give a receipt in full; the Court thought that this was evidence from which it might be presumed that the wife was acting within the scope of her authority when she offered to settle a demand for goods delivered at a shop in which she served, and the busi-

(z) *Reid v. Teakle*, 22 L. J. (C. P.) 161; 13 C. B. (76 E. C. L. R.) 627, *S. C.*; *Lane v. Ironmonger*, 13 M. & W. 368.

(a) 5 Bing. N. C. (35 E. C. L. R.) 196.

ness of which she was in the habit of conducting (b). But, on the other hand, where she equally carried on the business of the shop by her husband's authority, and attended to all the receipts and payments, a statement made by her that she would pay her rent on the day it would be due if it was remitted to her by her husband in time, and that the amount was £6, was held not to be evidence against her husband of the terms of his tenancy (c). The difference is obvious between the [*486] two cases; for, *though the wife might be the agent of her husband to make payments, she is not on that account necessarily his agent to admit an antecedent contract. Therefore, if the admissibility of her statement be rested on the ground of its being evidence of an antecedent lease, it must fail. Neither does her agency to make payments constitute her an agent to take a lease for the benefit of her husband.

I am not, however, now speaking of that sort of agency which is purely conventional, and in no way depends on the relation of husband to wife, inasmuch as it may be conferred on any one else; but of another and a peculiar sort of agency, which is implied from the circumstance of two persons living together as man and wife, from which circumstance a presumption arises that the wife has authority to bind the husband by her contracts for necessities suitable to his fortune and rank in life.¹ This is very clearly explained by Lord *Holt*

(b) *Clifford v. Burton*, 1 Bing. (8 E. C. L. R.) 199.

(c) *Meredith v. Footner*, 11 M. & W. 202.

¹ This agency (the existence of which is a question for the jury, *Lane v. Ironmonger*, 13 M. & W. 368; *Casteel v. Casteel*, 8 Blackf. 240), is, however, so far as necessities are concerned, to be presumed from the mere fact of cohabitation: *M'Cutchen v. M'Gahay*, 11 Johns. 281; *Fredd v. Eves*, 4 Harring. 385;

in *Etherington v. Parrott* (*d*), where he says: "It is the cohabitation that is an evidence of the husband's assent to contracts made by his wife for necessities." But then this must be taken subject to three observations: first, that the contract must be for *necessaries*; secondly, that the party *making it must not have been forbidden to trust her; and thirdly, that the presumption must, in the case of contracts entered into since stat. 45 & 46 Vict., c. 75 (*Married Women's Property Act*, 1882) came into force, be considered subject to the qualification contained in sect. 1, sub-sect. 3, of that Act, which enacts that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown."

Now, with regard to the question what are necessities, it is a question which always and obviously depends upon the circumstances of the particular case under discussion for the time being. Servants, suitable to the husband's fortune and rank, have been held to be such necessities in a case where the defendant was Governor of Barbadoes, and his wife, being about to quit England in order to join him there, engaged the

(*d*) *Ld. Raym.* 1006; *Waithman v. Wakefield*, 1 Camp. 120. See *Jolly v. Rees*, 33 L. J. (C. P.) 177; 15 C. B. (N. S.) (109 E. C. L. R.) 628.

Connerat v. Goldsmith, 6 Ga. 14; *Henderson v. Stringer*, 2 Dana, 291; so much so, that it matters not whether the woman be really the wife of the man sought to be charged, or only appear so to be, if he allow her to live with him and pass for his wife: *Watson v. Threlkeld*, 2 Esp. 637; *Blades v. Free*, 9 B. & C. (17 E. C. L. R.) 167.—R.

Furlong v. Hysom, 35 Me. 332; *Wood v. O'Kelley*, 8 Cush. 406; *Mitchell v. Treanor*, 11 Ga. 324.—S.

Lane v. McKeen, 15 Me. 304; *Green v. Sperry*, 16 Vt. 390; *Benjamin v. Benjamin*, 15 Conn. 347; *Leeds v. Vail*, 15 Pa. St. 185; *Breinig v. Meitzler*, 23 Ib. 156; *Eames v. Sweetser*, 101 Mass. 78; *Raynes v. Bennett*, 114 Ib. 424; *Powers v. Russell*, 26 Mich. 179; *Weir v. Groat*, 4 Hun, 193; *Flynn v. Messenger*, 28 Minn. 208.

plaintiff as her maid to accompany her on the voyage (*e*). The question is one which is continually arising, and of which there are many reported examples. Thus, in *Hunt v. De Blaquiere* (*f*), articles of furniture for a house were, under the circumstances of the case, held to be necessities.

But the cases most frequently referred to on the [*488] *subject are *Montague v. Benedict* (*g*) and *Seaton v. Benedict* (*h*). The name of the defendant probably strikes you as fictitious, and in truth it is so, being taken from a play of Shakespeare, called *Much Ado about Nothing*, in which one of the characters is a young officer named Benedict, who protests vehemently against marriage. The real defendant was a highly respectable professional gentleman; and it was sought in *Seaton v. Benedict* to charge him with a bill contracted by his wife for articles of millinery of a very expensive description. It appeared at the trial that she was already supplied with all the necessary articles of dress; and the Court held, on a motion for a new trial, that the defendant was in point of law entitled to the verdict.

In the other case of *Montague v. Benedict*, the goods supplied were articles of jewellery, to the amount of £83, which had been delivered in the course of two months. The plaintiff's evidence was, that the defendant lived in a furnished house of which the rent was £200 year, and that the lady had a fortune of £4000; the defendant's that the lady was already supplied with sufficient jewellery. The jury found a verdict for the plaintiff; but the Court set it aside, on the ground that

(*e*) *White v. Cuyler*, 1 Esp. 200; 6 T. R. 176.

(*f*) 5 Bing. (15 E. C. L. R.) 550.

(*g*) 3 B. & C. (10 E. C. L. R.) 631.

(*h*) 5 Bing. (15 E. C. L. R.) 28.

there was no evidence to support it. Mr. J. *Bayley* said, "If the husband and wife live together, [*489] *and the husband will not supply her with necessities or the means of obtaining them, then, although she has her remedy in the Ecclesiastical Court, yet she is at liberty to pledge the credit of her husband for what is strictly necessary to her own support. But, whenever the husband and the wife are living together, and he provides her with necessities, the husband is not bound by contracts of the wife, except where there is reasonable evidence to show that the wife has made the contract with his assent. Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence;¹ and when such assent is proved, the wife is the agent of the husband duly authorized." Indeed, the husband's assent during cohabitation being thus presumed to be given to the wife's contracting for necessities suitable to his degree, the suitability of the things contracted for is evidently to be considered. "It is because she is the agent of her husband," said *Parke, B.*, in *Lane v. Ironmonger (i)*, "that the tradesman ought to be careful not to supply her to an extravagant extent. For, giving orders to such an extent would go to show that she was not acting as the husband's agent, and to the extent authorized by him."

The before-mentioned observations of Mr. J. *Bayley* support the second of the rules to which I [*490] *adverted, namely, that the contract must not only be for necessities suitable to the husband's fortune

(i) 13 M. & W. 368.

¹ As, for instance, by showing that the tradesman gave credit to the wife herself: *Connerat v. Goldsmith*, 6 Ga. 14.—R.

Swett v. Penrice, 24 Miss. 416 —s.

and degree, but that the person making it must not have been forbidden to contract with the wife on his account.¹

This point, indeed, had been decided long before by the majority of the judges in the Exchequer Chamber, in the case of *Manby v. Scott* (*k*). The discussions in this case were exceedingly long and elaborate; and, as frequently happens in the old reports, the reasons given in some instances almost ludicrous; for instance, Mr. Justice *Twisden*, who was at first of opinion that it was not in the husband's power to prohibit another from trusting his wife for necessities, gave as a reason that, if he might prohibit one person he might go on doing so till he had at last prohibited every one in England; and then, says he, "If the husband should adopt this method, and join the King's enemies, the wife must go too, and then she will be hanged—or stay at home, and then she will be starved." However, the majority of the Court were of opinion that the husband may prohibit a particular person from trusting his wife even for necessities, and that, if he trust her in defiance of that prohibition, he cannot hold the husband liable.²

(*k*) 1 Lev. 4; 1 Siderfin, 109; 2 Smith L. C. 445, 8th ed.; Bac. Abr. "Baron & Feme."

¹ When a party has been expressly forbidden to give credit to a wife, in order to render the husband liable for subsequent supplies, it is incumbent on the party so forbidden to show affirmatively and clearly that the husband did not supply her with necessities suitable to her condition in life: *Keller v. Phillips*, 40 Barb. 390.

² It must not, however, be supposed that a husband will not be liable for necessities furnished the wife, when he, without fault on her part, refuses to supply her with them, even although he may have given notice not to trust her. It is only when he himself supplies her with necessities that a notice will be effectual to protect him: *Rotch v. Miles*, 2 Conn. 638; *Kimball v. Keyes*, 11 Wend. 33; *Emery v. Neighbour*, 7 N. J. 142; *Billing v. Pilcher*, 7 B. Mon. 458; *Fredd v. Eves*, 4 Harring. 385; and it would seem that in any case notice by newspaper is insufficient, unless it was proved to have reached

But the prohibition of the tradesman to trust
 *the wife need not always be an express prohi- [*491]

the party who supplied the articles: *Fredd v. Eves*. In such cases as these the husband is liable without his assent, and hence his liability necessarily rests on other grounds than those springing from the law of principal and agent, as is clearly shown in the American note to *Manby v. Scott*, 2 Smith's L. C., 8th Am Ed. 458.—R.

Harshaw v. Merryman, 18 Mo. 106. The husband is bound to pay for necessaries furnished to the wife, unless he has made other suitable provision for her: *Tebbetts v. Hapgood*, 34 N. H. 420. Recovery can be had for supplies to a wife during separation only when it was caused by the misconduct of the husband, or was by mutual consent without adequate allowance for the wife's support: *Reese v. Chilton*, 26 Mo. 598. It is wholly unaffected by the creditor's knowledge or ignorance of the facts on which the liability depends: *Gill v. Read*, 5 R. I. 343. And see further, *Williams v. Coward*, 1 Grant, 21. If a wife leave her husband without his consent or fault, he is not liable even for necessaries, unless furnished by his orders: *Collins v. Mitchell*, 5 Harring. 369; *Kemp v. Downham*, Ib. 417; *Pool v. Everton*, 5 Jones, 241; *Morgan v. Hughes*, 20 Tex. 141; *Black v. Bryan*, 18 Ib. 453; *Descelles v. Kadmus*, 8 Iowa, 51; *Mayhew v. Thayer*, 8 Gray, 172; *Rea v. Durkee*, 25 Ill. 503; *Cromwell v. Benjamin*, 41 Barb. 558. As to what are necessaries, see *Hall v. Weir*, 1 Allen, 261.—s.

The following have been held to be necessaries—Board, lodging, medicine, and medical attendance: *Mayhew v. Thayer*, 8 Gray, 172; *Cotteran v. Lee*, 24 Ala. 380; *Spann v. Mercer*, 8 Neb. 337; articles of wearing apparel and jewelry suitable to the wife's position: *Morton v. Wethens*, Skin. 348; *Raynes v. Bennett*, 114 Mass. 424; proper legal expenses in proceedings against the husband: *Shepherd v. Mackord*, 3 Camp. 326; *Wilson v. Ford*, L. R. 3, Ex. 63; *Porter v. Briggs*, 38 Iowa, 166; *Warner v. Heiden*, 28 Wis. 517; *Morris v. Palmer*, 39 N. H. 123; the services of a dentist: *Freeman v. Holmes*, 62 Ga. 556; *Gilman v. Andrews*, 28 Vt. 241. On the contrary, it has been held that the following are not necessaries: The expense of unwarranted legal proceedings against the husband: *Grindell v. Godmond*, 5 Ad. & El. (31 E. C. L. R.) 255; *Smith v. Davis*, 45 N. H. 566; *Whipple v. Gates*, 55 Ib. 139; *Pearson v. Darrington*, 32 Ala. 227; *Thompson v. Thompson*, 3 Head, 527; *Chelton v. Pendleton*, 18 Conn. 417; *Drais v. Hogan*, 50 Cal. 121; medical attendance rendered, without the husband's assent, by a quack doctor: *Wood v. O'Kelley*, 8 Cush. 406 (see, however, *M'Clallan v. Adams*, 19 Pick. 333); religious instruction or the rent of a pew in a church: *St. John's Parish v. Bronson*, 40 Conn. 76.

In *Parke v. Kleeber*, 37 Pa. St. 251, which was an action for the price of a piano, Woodman, J., said: "It is impossible to state a comprehensive definition of family necessaries. They must be left for cases to define as cases arise. It is not to be doubted that in some circumstances a piano would be necessary to the support of a family, as where the wife should teach music for a livelihood, or a daughter was to be educated, for education may fairly

bition communicated to him. A general prohibition to the wife to pledge the husband's credit may, though uncommunicated to the tradesman, be sufficient to prevent his holding the husband liable. Thus in the case of *Jolly v. Rees* (*l*) it was held, "that the presumption which exists during cohabitation, and from that circumstance, that the husband assents to contracts made by the wife for necessities suitable to his degree and credit, *may be rebutted by showing that he has forbidden his wife to pledge his credit, although no notice of that fact has been communicated to the tradesman*" (*m*). This case has been followed by both the Court of Appeal and the House of Lords in the case of *Debenham v. Mellon* (*n*). But in order to make such a secret revocation of authority binding there must have been nothing in the previous conduct of the husband to lead the particular tradesman to think that the wife was authorized to pledge the husband's credit. If there had been such conduct the husband would not be allowed to deny the authority (*o*). In fact the general law of agency in this respect is strictly applicable (*p*).

[*492] *The points which we have been hitherto considering all arise in cases in which the husband and wife continue to live together. But if the

(*l*) 15 C. B. (N. S.) (109 E. C. L. R.) 628; 33 L. J. (C. P.) 177.

(*m*) 2 Smith L. C. 499, 8th edit. (note to *Manby v. Scott*).

(*n*) 5 Q. B. D. 394 (C. A.); 6 App. Cas. 24 (H. L.); 49 L. J. (Q. B., etc.) 497; 50 Ib. 155.

(*o*) *Jolly v. Rees*, 15 C. B. N. S. (109 E. C. L. R.) 628, 640; 33 L. J. (C. P.) 177, 179.

(*p*) See *ante*, p. *418.

enough be included in the word support. In other circumstances it would be a luxury and not a necessity. The best the judge could do with such a question was to commit it to the jury under all the evidence, and to accompany it, as was done in this case, with observations calculated to give the deliberations of the jury a right direction." But see *Chappell v. Nunn*, 41 L. T. N. S. 287.

wife, when she makes the contract, is living separated from her husband, the case is quite different; and the only question is, whether the separation is with the husband's assent, or produced by the husband's misconduct. If the husband drive his wife from home, or if he do so misconduct himself that it is morally impossible and unreasonable that she should continue to reside in his house, he sends her into the world with authority to pledge his credit for her necessary expenses. And this authority he cannot revoke or control by any notice or prohibition whatever. "If a man," said Lord *Eldon*, in *Rawlins v. Vandyke* (*q*), "will not receive his wife into his house, or turns her out of doors, he sends her with credit for her reasonable expenses." "Where a wife's situation in her husband's house," says Lord *Kenyon*, in *Hodges v. Hodges* (*r*), "is rendered unsafe from his cruelty and ill-treatment, I shall rule it to be equivalent to his turning her out of the house, and that the husband shall be liable for necessities furnished to her under those circumstances" (*s*).¹ Even if the husband

(*q*) 3 Esp. 250.

(*r*) 1 Esp. 441.

(*s*) See *Houlston v. Smyth*, 3 Bing. (11 E. C. L. R.) 127; *Bolton v. Prentice*, 2 Str. 1214.

¹ See also *Sykes v. Halstead*, 1 Sand. 483; *Rutherford v. Coxe*, 11 Mo. 347; *Evans v. Fisher*, 5 Gilm. 569; *Fredd v. Eves*, 4 Harring. 385; *Pidgin v. Cram*, 8 N. H. 350; *Clement v. Mattison*, 3 Rich. 93. And it is not necessary that actual bodily cruelty should be used to her, as it has been held (overruling *Harwood v. Heffer*, 3 Taunt. 421) that if a husband, by bringing another woman to live under his roof as a mistress, thereby renders his house unfit for the residence of his wife, he is bound to provide her with necessities during the separation: *Aldis v. Chapman*, T. T. 50 Geo. III., cited 1 Selwyn's N. P. 298; *Houlston v. Smyth*, 3 Bing. (11 E. C. L. R.) 127; *Blowers v. Sturtevant*, 4 Den. 46. As in the case of an infant, however, the husband is not liable for money lent to enable her to procure necessities: *Walker v. Simpson*, 7 W. & S. 83.—R. And see *Snover v. Blair*, 25 N. J. 94. If the husband secures to the wife a separate maintenance, and pays it, he is not liable: *Calkins v. Long*, 22 Barb. 97.—s.

[*493] become *lunatic, and therefore unable to provide his wife with necessaries, he is in the same situation as a husband omitting to furnish them (*t*). But the authority of the wife to pledge her husband's credit is no greater in the case of a lunatic than in the ordinary case of husband and wife (*u*).

In like manner, if the husband and wife mutually consent to live apart, she has a right to bind him by contracting for her reasonable and necessary expenses as long as the consent continues (*x*).¹ But in those cases in which the wife, living apart from her husband, has authority to bind him by contracts for necessaries, if he allow and pay her a sufficient maintenance, the authority is gone, and her contracts, even for necessaries, will not bind him; the reason of which is, that the authority is given by law for the wife's protection, to save her from distress occasioned by her husband's misconduct; but if he make her a proper allowance, and pay it, there is no such danger; and then *cessante ratione cessat lex*;² thus in *Mizen v. Pick* (*y*), the Court of Exchequer decided that it makes no difference that the tradesman, when he trusts the *wife, has no notice that her husband makes her an adequate allowance.³

(*t*) *Read v. Legard*, 6 Ex. 636; and see *ante*, p. *362.

(*u*) *Richardson v. Du Bois*, L. R. 5 Q. B. 51; 39 L. J. (Q. B.) 69.

(*x*) *Hodgkinson v. Fletcher*, 4 Camp. 70; *Nurse v. Craig*, 2 Bos. & P. N. R. 148.

(*y*) 3 M. & W. 481; *Johnson v. Sumner*, 27 L. J. (Ex.) 341; 3 H. & N. 261.

See *Jolly v. Rees*, 15 C. B. (N. S.) (109 E. C. L. R.) 628; 33 L. J. (C. P.) 177; *Biffin v. Bignell*, 31 L. J. (Ex.) 189; 7 H. & N. 877.

¹ And not only for necessaries furnished to herself, but to the children of the marriage, if he suffer them to remain with her: *Rumney v. Keyes*, 7 N. H. 571; *Kimball v. Keyes*, 11 Wend. 33.—R. *Walker v. Loughton*, 31 N. H. 111.—S.

² *Cany v. Patton*, 2 Ashm. 140; *Baker v. Barney*, 8 Johns. 72; *Fenner v. Lewis*, 10 Ib. 38; *Mott v. Comstock*, 8 Wend. 544; *Kimball v. Keyes*, 11 Ib. 33.—R.

³ The same point had been so previously decided in this country in *Cany v. Patton*, 2 Ashm. 140.—R.

And if the wife when living separate has a sufficient maintenance, though not paid by her husband, supplies furnished to her cannot be necessities for which he is liable (z). But where they separate by mutual consent, at the time of the separation making their own terms, then so long as they continue the separation those terms are binding on both; and if the terms are that the wife shall receive a specified income for maintenance and shall not apply for anything more, then she has a provision which she agrees to accept as sufficient. Therefore, at all events as long as the husband fulfils the terms on his part, the authority to pledge his credit for necessities is gone, the adequacy of the income is immaterial, and the husband is no longer liable (a).

Thus, you see that if the wife be driven from home by the husband's misconduct, or if they separate by mutual consent, she carries with her an implied authority to pledge his credit so long as that separation continues, unless he pay her an allowance adequate to *her* support and his own means, or unless she has a provision which either is in fact sufficient, or which she has agreed to *accept as such. But, when the separation is occasioned neither by his misconduct [*495] nor consent, the case is otherwise. In such case she has no authority at all to pledge her husband's credit, and the person who contracts with her does so at his peril (b).¹

(z) *Clifford v. Laton*, M. & M. (22 E. C. L. R.) 101; see also *Richardson v. Du Bois*, L. R. 5 Q. B. 51, 39 L. J. (Q. B.) 69.

(a) *Eastland v. Burchell*, 3 Q. B. D. 432; 47 L. J. (Q. B., etc.) 500.

(b) *Hardie v. Grant*, 8 C. & P. (34 E. C. L. R.) 512; *Morris v. Martin*, 1 Str. 647.

¹ And it is immaterial whether he does or does not know of the wife's having left her husband: *Hunter v. Boucher*, 3 Pick. 289; *McCutchen v. McGahay*, 11 Johns. 281; *Walker v. Simpson*, 7 W. & S. 83; *Evans v. Fisher*, 5 Gilm. 569. The rule admits of no exception, of course, in the case of necessities: *Williams v. Prince*, 3 Strob. 490. And even if the husband and wife have

And where a married woman is found living apart from her husband, the *prima facie* presumption is, that it is neither in consequence of his improper conduct nor by his assent, and therefore it always lies on the person who gave her credit to show what were the circumstances under which they were separated (*c*).

It only remains to observe that, where the wife, in consequence of the circumstances under which she separated from her husband, has authority to bind him by contracts, those contracts must be for necessities suitable to his rank and means. What *are* such necessities, is a question which of course turns on the particular circumstances of each case (*d*). There are

(*c*) *Reed v. Moore*, 5 Car. & P. (24 E. C. L. R.) 200; *Mainwaring v. Leslie*, M. & M. (22 E. C. L. R.) 18; *Edwards v. Towells*, 5 M. & G. (44 E. C. L. R.) 624.

(*d*) *Hunt v. De Blaquiere*, 5 Bing. (15 E. C. L. R.) 550; *Ewers v. Hutton*, 3 Esp. 255. See also *Ambrose v. Harrison*, 20 L. J. (C. P.) 135; 10 C. B. (70 E. C. L. R.) 776; *Bradshaw v. Beard*, 31 L. J. (C. P.) 273; 12 C. B. (N. S.) (104 E. C. L. R.) 344. In the two last cases the husband was held liable for the funeral expenses of his wife, who was living apart from him. As to the right (originally equitable only) to recover from the husband money advanced to his wife in order to be expended in necessities, see *per Bramwell*, L. J., in *Drew v. Nunn*, 4 Q. B. D. 661, 663; *Jenner v. Morris*, 3 De G. F. & J. 45; 30 L. J. (Ch.) 361; *Davidson v. Wood*, 1 De G. J. & S. 465; 32 L. J. (Ch.) 400.

separated by mutual consent, and the wife goes to live in the house of a third person, with whom the husband makes a contract to support her, if she leave the house of that person voluntarily and without just cause, she will carry with her no authority to pledge his credit for her support, though if she were driven from that house by improper usage, it would be different: *Pidgin v. Cram*, 8 N. H. 350. In case, however, the wife should return to her husband, or even should in good faith offer to return to him (and the question of such good faith is one upon the evidence for the jury: *Cunningham v. Irwin*, 7 S. & R. 259), his liability is revived from the time of such return or offer: *Harris v. Morris*, 4 Esp. 41; *M'Gahay v. Williams*, 12 Johns. 293; *Henderson v. Stringer*, 2 Dana, 292; *Rennick v. Ficklin*, 3 B. Mon. 166; *Cunningham v. Irwin*, *supra*; *Blowers v. Sturtevant*, 4 Den. 46. The husband is not, however, liable for anything furnished to the wife during the interval between her leaving him and her return: *Williams v. Prince*, 3 Strob. 490.—R.

two modern cases involving *rather singular [*496] questions: *Turner v. Rookes* (*e*), and *Grindell v. Godmond* (*f*). In *Turner v. Rookes* the husband and wife were living separate by consent, under a deed of separation, by which she had a separate maintenance of £112 a year; so that, as long as that was paid, she would have no authority to bind the husband for necessities of an ordinary description; but it appeared that the husband had used threats of violence towards her, which occasioned her so much alarm that she thought it necessary to exhibit articles of the peace against him. In order to do this she was obliged to employ an attorney, and not being able to pay his bill of costs, he brought his action to recover it against the husband. The Court held that the proceeding was necessary for the wife's safety; and, therefore, that she had a right to bind the husband by contracting for it; and that, though the maintenance allowed her might be sufficient for ordinary purposes, yet this was an extraordinary contingency not likely to have been contemplated in arranging the amount of maintenance, and which therefore was not covered by it; and they held the husband liable, as having, through his *wife, employed [*497] the attorney to exhibit articles of the peace against himself.

The other case was one in which the husband had assaulted and ill-treated his wife, who preferred an indictment against him at the Beverley sessions, upon which he was convicted, and sentenced to twelve months' imprisonment, and a fine of £50. The attorney who conducted the prosecution, thinking, very correctly, that if he carried it on without funds, he would have no remedy against any one, required money

(*e*) 10 A. & E. (37 E. C. L. R.) 47.

(*f*) 5 A. & E. (31 E. C. L. R.) 755.

in hand, which the lady borrowed from her brother, and he brought an action against the husband to be reimbursed; but the Court thought that, though it might be necessary that she should exhibit articles of the peace for her own personal security, yet that it could not be necessary that she should assume the offensive, and prefer an indictment against him, and, consequently, that the plaintiff was not entitled to recover. In a later case upon this subject, the costs of a proctor employed by a wife to prosecute a suit in the Ecclesiastical Court against her husband for a divorce *à mensâ et thoro*, on the ground of cruelty, were held to be recoverable against the husband, as a necessary, if it appeared that there were reasonable grounds for instituting such a suit; for where there had been cruelty such a divorce might be necessary for the protection of the wife, and where she had no means of her own she would lose that protection, unless she could pledge her [*498] *husband's credit (g). In a still more recent case (h) the legal expenses incurred by a deserted wife,—(1) preliminary and incidental to a suit for restitution of conjugal rights; (2) in obtaining counsel's opinion on the effect of an ante-nuptial agreement for a settlement; (3) in obtaining professional advice as to the proper mode of dealing with tradespeople, who were pressing her to pay them for necessities supplied to her since she had been deserted, and also of preventing a distress threatened on furniture belonging to her husband in the house she occupied;

(g) *Brown v. Ackroid*, 25 L. J. (Q. B.) 193; 5 E. & B. (85 E. C. L. R.) 819, 826; *per Lord Campbell*, C. J.

(h) *Wilson v. Ford*, L. R. 3 Ex. 63; 37 L. J. (Ex.) 60. Where it is necessary for the wife to take proceedings under the Divorce Acts, "extra costs," *i. e.*, costs reasonably incurred by the solicitor beyond the costs taxed and allowed as between party and party are recoverable by him from the husband as necessities: *Ottaway v. Hamilton*, 3 C. P. D. 393; 47 L. J. (Q. B., etc.) 424, 725.

were held to be necessities for which she had implied authority to pledge his credit.

The wife also may, under some circumstances, pledge her husband's credit for such necessities for their children as may be reasonable with reference to the husband's station. Thus in *Bazeley v. Forder* (i), the plaintiff, on the order of the defendant's wife, supplied clothes for the defendant's child; the wife was living separate from him, for reasons which justified her doing so, and the child, *which was under seven years of age, was living with her, against the defend- [*499] ant's will, an order of the Master of the Rolls having been made, under 2 & 3 Vict., c. 54, giving the wife the custody. The wife had no means adequate to support her according to her husband's degree. It was held, that, as the child was by law properly in the care of the wife, the reasonable expenses of providing for it were part of the reasonable expenses of the wife, for which she had authority to pledge her husband's credit.

The whole of this branch of the law may be shortly summed up thus: while a wife continues to live with her husband, the presumption, except so far as it may be qualified by s. 1, sub-s. 3, of the Married Women's Property Act, 1882, already referred to (*ante*, p. *487), is that she has authority to bind him by contracting for necessities; but that presumption is subject to be rebutted. When she is living separately from him, the presumption is that she has no such authority; but that presumption also is subject to be rebutted, by showing that the separation was by consent, or occasioned by the husband's misconduct; in which cases, if he leaves her without adequate funds for her support, she has a right to pledge his credit by contracting for necessities.

(i) L. R. 3 Q. B. 559; 37 L. J. (Q. B.) 237; in Ex. Ch. 9 B. & S. 725.

I have now gone through the subject which I proposed at the commencement of these lectures, with the exception of the last point. I have made *men-
 [*500] tion of the different sorts of contracts, the peculiarities of those by record, by writing sealed and delivered, and writing not under seal; of the consideration which a simple contract requires to support it; of the effect of illegality, whether by Common or Statute Law, in invalidating contracts; of the competency of the parties, and of the rules which govern contracts entered into by those parties through the medium of agents.

It remains to point out, in a few words, the *remedies* by which the observance of contracts may be enforced, and their non-observance punished. The ordinary remedy for breach of contract is by an action claiming damages, and, where damages are an inadequate compensation, claiming specific performance. The latter claim, however, would not be applicable to by far the larger proportion of the contracts considered in these lectures, and it is not intended to pursue the subject of specific performance further (*k*). These lectures only profess to deal with contracts under their Common Law aspect, as has been already said (*ante*, p. *98), and specific performance was, before the Judicature Acts, the remedy in Courts of Equity only. *There* a specific performance might, as you know, in many cases be com-
 [*501] pelled; there was no such thing as a *specific performance to be had in a Court of law, except in the cases to which the writ of *mandamus* was applicable, which could, however, never be obtained when there was any other remedy. And although by

(*k*) For further information as to the principles on which Courts of Equity have decreed specific performance, see *Cuddee v. Rutter*, 1 White & Tudor's L. C. in Equity, p. 848, 5th ed., and the notes thereto; see also Fry on Specific Performance.

the provisions of the Common Law Procedure Act, 1854 (17 & 18 Vict., c. 125), ss. 68-74, the remedy of *mandamus* was extended, yet by the construction put by the Courts of Common Law on those provisions, the compelling specific performance in private contracts could not be said to be within their jurisdiction. For it was held by the Court of Queen's Bench to be quite clear that the statute did not intend to give a Court of Common Law the power to decree specific performance of a private contract; and where the duty sought to be enforced by a *mandamus* arose merely upon a personal contract, to grant a *mandamus* would be in effect to decree specific performance of such a contract (*l*). Where, therefore, the plaintiff agreed to let, and the defendant to take, a certain house upon lease for seven years from a day ensuing, the lease to be prepared at defendant's expense and executed within three months, and thereupon the plaintiff did prepare the lease, but the defendant refused to execute it, upon which the plaintiff sued him, and in his declaration claimed a writ of *mandamus* according to section 68 of the Common Law Procedure Act, 1854, *the Court held that that Act did not extend to enforce this duty, which arose [*502] out of a contract merely personal (*m*).

If the contract be by record, the remedy is by writ of *scire facias* (*n*), which lies only upon a record, and which has obtained its name from the Latin words it formerly contained, commanding the sheriff to make the defendant know that the Court commanded his appearance to answer why execution should not issue against him.

(*l*) *Norris v. Irish Land Company*, 27 L. J. (Q. B.) 115; 8 E. & B. (92 E. C. L. R.) 512.

(*m*) *Benson v. Paul*, 25 L. J. (Q. B.) 274; 6 E. & B. (88 E. C. L. R.) 273 S. C.

(*n*) See *ante*, p. *4.

If the record create a debt, that is, render a sum certain payable by the one party to the other, an action in the ordinary form will lie to enforce payment, if the plaintiff prefer that form of proceeding to a *scire facias*.

Formerly, at Common Law, there were distinct forms of action applicable to the breach of distinct species of contract; and although the forms of action have been practically abolished (*o*), yet some explanation of them seems desirable, in order to understand their meaning in the Statutes of Limitation to the consideration of which we are coming.

The action of debt lay in every case where there was a liquidated pecuniary duty from one person to another.

[*503] *If the contract were by deed, the remedy was by action of covenant, which lay to enforce a contract by deed, for which it was the only remedy at Common Law, unless the contract were for payment of a liquidated sum, in which case, as I have already said, the plaintiff might, if he preferred it, maintain an action of debt. If the contract were neither by record nor by deed—if, in other words, it was a simple contract, either reduced to writing, or by mere words without writing,—the remedy, unless it were for payment of a fixed sum of money, in which case debt also would lie, was by an action of *assumpsit*. This was originally a sort of action of trespass upon the case, and was called *assumpsit* from the words “undertook and promised,” which always appeared in the declaration. When the Uniformity of Process Act (*p*) was passed, the schedule contained a form of writ in which it was described as an action on promises; in consequence of which it was most commonly denominated

(*o*) See rules of the Supreme Court, 1883, O. I., r. 1, which re-enacts 38 & 39 Vict., c. 77 (Judicature Act, 1875), sched. I., order I., rule 1.

(*p*) 2 & 3 Will. 4, c. 39.

an action on promises. It was the great remedy upon the breach of simple contracts.

There was, besides, a sort of action called an action of *account*, which had become almost completely obsolete and disused.

Now, these being the remedies by which contracts are enforced in courts of law, the next question is, as to the *time* within which those remedies are to be pursued: and those times depend upon *the provisions of the Acts of Parliament which we call [*504] *Statutes of Limitation*.

The policy of the Legislature in enacting such statutes, and thereby constituting a time after the lapse of which, engagements shall be no longer capable of being enforced, has always been considered unexceptionable.

When you find a debt or an engagement existing after the lapse of a long period of time, it is possible, indeed, that strict justice may require its enforcement, but it is also possible that great injustice may be done by enforcing it. Suppose, for instance, an executor finds a bond forty years old in his testator's repository, it may be that the principal and interest are due and unpaid, but it may also be that they have been paid; or that great part has been paid, and that the vouchers have been lost; or it may be that the bond was deposited with the testator as a collateral security, and that no liability ever in reality accrued upon it, but that the obligee forgot to reclaim it or died pending the suretyship, leaving his representatives in ignorance of the transaction. It may be quite impossible, after the lapse of forty years, to prove this. Indeed, it may be in the knowledge of no person living. Now, there would be the greatest hardship in calling upon a man, after the lapse of an indefinite space of time, to defend

himself against such a demand; but there is no great hardship imposed on the obligee by requiring him
 [*505] *to enforce his claim within a reasonable time, if he intend to enforce it at all.

This, then, is the policy of the Statutes of Limitation—to prevent obsolete claims from being raked up. And now as to the time which the Legislature has appointed for the purpose of pursuing the several remedies of which I have spoken.

With regard to *scire facias*, there was, for a long while, no limitation imposed by statute to the commencement of that proceeding; but now, by 3 & 4 Will. IV., c. 42, s. 3, a *scire facias* on a recognizance must be sued out within twenty years.

An action of debt founded upon a contract made by deed was not formerly subject to any limitation in respect of the time within which it might be commenced: not that you are to suppose that there was *practically* no security against an obsolete claim founded on a deed, for the Courts had introduced a presumption that such claims were satisfied after the lapse of twenty years: and if no evidence of any acknowledgment of the existence of the claim appeared to have taken place within that time, they recommended the jury to presume payment or a release, as the nature of the case happened to require; but there was no statute which could be pleaded in bar of such action until the 3 & 4 Will. IV., c. 42, the 3rd section of which establishes the limitation of twenty years, and is as follows:—

“That all actions of debt for *rent upon an indenture*
 [*506] *of demise*, all actions of *covenant or debt upon*
 **any bond or other specialty*, and all actions of debt or *scire facias* upon any *recognizance*, and also all actions of debt upon any *award* where the submission

is not by specialty, or for any fine due in respect of any copyhold estates, or for any *escape*, or for *money levied on any fieri facias*, and all actions for any penalties, damages, or sums of money given to the *party grieved*, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after ; that is to say, the said actions of debt for rent upon any indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, *within ten years after the end of this present session* [A. D. 1833], *or within twenty years after the cause of such actions or suits, but not after.*"

It will be observed that the periods of limitation begin to run from the accruing of the cause of such actions or suits ; and for this reason, where it is sought to investigate the question when a cause of action has accrued, recourse is very commonly had to the decisions upon the Statutes of Limitation. In the case of *Tuckey v. Hawkins* (*q*), the defendant pleaded to an action of debt on a bond that the cause of action did not accrue at any time within twenty *years [*507] next before the commencement of the suit, and the issue raised for trial was upon a traverse of this averment. On the bond being produced at the trial, it appeared to be a *post obit* bond, and it was proved that the party upon whose death the sum secured thereby was made payable died within twenty years. It was held that the verdict ought to be for the plaintiff. In the course of his judgment in that case, *Wilde*, C. J., says: "What does the Legislature mean by the

‘cause of action’? The object of the Statute of Limitations was to prevent parties from being harassed by stale demands, brought forward against them at a period when all their witnesses *might* reasonably be presumed to be dead, and when the circumstance of the plaintiff’s having lain by so long without challenging them to make payment, afforded fair ground for presuming that the debt had been paid. The Legislature has thought twenty years a convenient period, beyond which the obligor in a bond ought to be relieved from the necessity of preserving evidence in discharge of his liability. Bearing in mind, therefore, that the sole object of the Legislature was to discharge parties from demands that might and ought to have been enforced at an earlier period, we have plain means of ascertaining the intention with which they used the words ‘cause of action,’ that is, a cause of action capable of being enforced. We must read the words ‘debt’ and [*508] ‘cause of action’ in the plea *in the same sense in which the statute makes such a plea a bar to the action. What then is the meaning of this plea? That the action might have been brought more than twenty years before it was brought.” It followed, therefore, that, as the action could not have been brought till after the death which made the money secured by the bond become payable, the cause of action did not accrue till the happening of that event, and the plea was answered by the replication which traversed or denied it. But if a bond be conditioned to do various things, the first breach of one of those conditions is not, as will readily be supposed, such an accruing of the cause of action on the bond as will cause the statute to begin to run so as to prevent the obligee from suing for subsequent breaches of the obligation to do other of those things, any more than it

would be so in the case of the first breach of a covenant to do such things (*r*).

The action of *covenant* is liable to the same observations as the action of debt founded on a deed; the same section of 3 & 4 Will. IV., c. 42, has (as you will observe) applied the limitation of twenty years to it also.

The period of twenty years has, however, as has been already noticed (*s*), in the case of certain covenants and bonds, been reduced to twelve *years. This change has been effected by the Real Property [*509] Limitation Act, 1874 (37 & 38 Vict., c. 57), s. 8 of which imposes the limitation of twelve years on actions and suits for the recovery of money charged on land.

This provision extends to a covenant in a mortgage deed to pay principal and interest. The remedy therefore upon such a covenant must now be pursued within twelve years (*t*). And a collateral bond to secure a mortgage debt is equally within that section, so that the remedy upon such a bond must be pursued within twelve years also (*u*). Similarly an action on a covenant to pay rent would also seem to be an action to recover rent within section 1 of the same Act, which imposes the same limitation of twelve years on such an action.

Now, from these limitations thus introduced by 3 & 4 Will. IV., c. 42, and qualified by the Act of 1874, there are certain excepted cases.

In the first place, by the 4th section of 3 & 4 Will. IV., c. 42, as amended by 19 & 20 Vict., c. 97 (Mercantile Law Amendment Act, 1856), s. 10, if the person entitled to bring an action be an infant, a married woman, or an insane person, the time runs not from the

(*r*) *Sanders v. Coward*, 15 M. & W. 56.

(*s*) *Ante*, p. *38, n. (*x*).

(*t*) *Sutton v. Sutton*, 22 Ch. Div. 511; 52 L. J. (Ch.) 333.

(*u*) *Fearnside v. Flint*, 22 Ch. Div. 579; 52 L. J. (Ch.) 479.

accrual of the right of action, but from the removal of disability, as it is called.

In the second place, if the defendant be beyond [*510] ^{*seas}, the time runs from his return; that is also by the Act of 3 & 4 Will. IV. In the case of joint debtors, the fact of one or more being beyond seas at the time of the accrual of the cause of action, is no longer a bar to the period beginning to run as to joint debtors in the kingdom at that time (x). Also, in the case of an action to recover rent within the meaning of 37 & 38 Vict., c. 57, s. 1, no time is to be allowed for absence beyond seas. This is by s. 4 of the last-mentioned Act.

In the third place, if an acknowledgment of the liability be given in writing, signed by the person liable or his agent, the time runs from the date of that acknowledgment. This is by sect. 5 of 3 & 4 Will. IV., c. 42, in respect of specialty contracts unaffected by 37 & 38 Vict., c. 57 (Real Property Limitation Act, 1874). It is important, therefore, to ascertain what is sufficient to constitute such an acknowledgment. It is required by the statute to be made by writing, signed by the party liable by virtue of such indenture, specialty, or recognizance, or by his agent.¹ Where the acknowl-

(x) 19 & 20 Vict., c. 97, s. 11. The effect of this section is more fully considered further on.

¹ Statutes like that of 3 & 4 Wm. IV., c. 42, have been enacted in Maine, Massachusetts, New York, Mississippi, Arkansas, and perhaps in some of the other States: *Colburn v. Averill*, 30 Me. 310; *Williams v. Gridley*, 9 Metc. 485; *Wadsworth v. Thomas*, 7 Barb. 445; *Thornton v. Crisp*, 14 Sm. & M. 52; *Ringgold v. Dunn*, 8 Ark. 497. Apart from the operation of such statutes, it is now very generally held, on both sides of the Atlantic, that the fullest acknowledgment of a debt is not sufficient to take the case out of the limitation acts, if such acknowledgment be accompanied with expressions inconsistent with a definite promise to pay. Thus, a promise to make an arrangement to pay will not be sufficient, as it shows that the defendant instead of being wil-

edgment is expressly made for the purpose of preventing the operation of the statute, no difficulty arises. But where admissions have been made for other purposes, and it is sought to convert them into equivalents for the acknowledgment required by the statute, some

ling to pay the debt as it stands, contemplates paying it in some other manner: *Kensington Bank v. Patton*, 14 Pa. St. 479; *Morgan v. Walton*, 4 Ib. 322; *Oakes v. Mitchell*, 15 Me. 360. So the statement of a debt in an insolvent petition, for the circumstances under which it is made are inconsistent with an immediate provision of payment: *Christy v. Flemington*, 10 Pa. St. 129. Such a statement as "I owe the debt, but won't pay it," which would be, under the older decisions, entirely sufficient to take the case out of the statute, would at the present day be wholly insufficient: *Moore v. Bank of Columbia*, 6 Pet. 92; *Sigourney v. Drury*, 14 Pick. 390; *Barnard v. Bartholomew*, 22 Ib. 291; *Munford v. Freeman*, 8 Metc. 432; *Allen v. Webster*, 15 Wend. 284; *Berghaus v. Calhoun*, 6 Watts, 220; *Allison v. James*, 9 Ib. 381; *Kensington Bank v. Patton*, *supra*; *Carruth v. Paige*, 22 Vt. 179 (approving *Phelps v. Stewart*, 12 Ib. 256); *Ventris v. Shaw*, 14 N. H. 422; *Burton v. Wharton*, 4 Harring. 296; *Gardner v. M'Mahon*, 3 Q. B. (43 E. C. L. R.) 561; *Hart v. Prendergast*, 14 M. & W. 741.—R.

Sherman v. Wakeman, 11 Barb. 254; *Harbold v. Kuntz*, 16 Pa. St. 21; *Hazlebaker v. Reeves*, 12 Ib. 264; *Patterson v. Cobb*, 4 Fla. 481; *Ayres v. Richards*, 12 Ill. 146; *Gillingham v. Gillingham*, 17 Pa. St. 302; *Bell v. Crawford*, 8 Gratt. 110; *Moore v. Hyman*, 13 Ired. 272; *Boxley v. Gayle*, 19 Ala. 151; *Bryan v. Ware*, 20 Ib. 687; *Grant v. Ashley*, 12 Ark. 762; *Ten Eyck v. Wing*, 1 Mich. 40; *Brainard v. Buck*, 25 Vt. 573; *Deloach v. Turner*, 6 Rich. 117; *Pool v. Relfe*, 23 Ala. 701; *Mitchell v. Clay*, 8 Tex. 443; *Guy v. Tams*, 6 Gill, 82; *Carroll v. Forsyth*, 69 Ill. 127; *Blakeman v. Fonda*, 41 Conn. 561; *Patton v. Hassinger*, 69 Pa. St. 311; *Johns v. Lantz*, 63 Ib. 324; *McClelland v. West*, 59 Ib. 487; *Hunter v. Kittredge's Estate*, 41 Vt. 359; *Brayton v. Rockwell*, Ib. 621; *Knight v. House*, 29 Md. 194. The acknowledgment must be to the party or his agent, and not to a third person: *Carroll v. Forsyth*, 69 Ill. 127; *Sibert v. Wilder*, 16 Kan. 176; *McKinney v. Snyder*, 78 Pa. St. 497; *Trousdale v. Anderson*, 9 Bush, 276; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90.—S.

In Reed on the Statute of Frauds, §§ 1080–1093, and note, it is stated that the new undertaking is required to be in writing, signed by the party to be charged thereby, in England, Ireland, Canada, Alabama, Arkansas, California, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Vermont, Virginia, West Virginia, Wisconsin, Arizona, Dakota, Idaho, Montana, New Mexico, Utah, and Wyoming; and need not necessarily be in writing in Colorado, Connecticut, Delaware, Florida, Kentucky, Maryland, New Hampshire, Pennsylvania, Rhode Island, and Tennessee.

[*511] nicety occurs, as it always does when *a question of equivalents arises. Thus, where an action was brought by an executor on a covenant in an indenture of mortgage executed by the defendant to the testator in June, 1824, to secure payment of the money borrowed and interest, and the defendant relied upon the lapse of time as a defence, the plaintiff attempted to prove an acknowledgment by giving in evidence a deed executed within twenty years by the defendant. The deed recited the execution of the mortgage by the defendant to the testator, for securing certain money and interest, and stated that he conveyed the property mortgaged, with other things, to trustees to sell, and to pay out of the proceeds the mortgage and other incumbrances on the property; and the Court of Exchequer held that this was not such an acknowledgment as was required by the statute (*y*), not being an admission of any existing debt. On the other hand, where the action was on a covenant in a mortgage-deed, to pay the plaintiff principal and interest on the 1st of November, 1830, and the question on a defence of the Statute of Limitations was upon the fact of an acknowledgment of the debt, the plaintiff proved a deed of conveyance from the defendant to Thompson of the equity of redemption in the premises mortgaged. It was dated within twenty years, and after reciting the mortgage-deed, recited also [*512] that *the principal sum still remained due by virtue of that deed, all the interest having been paid up to the date. It also contained a covenant by Thompson with the defendant to pay the principal and interest, and to indemnify the defendant in case he should be called upon to pay them. "The deed," said the Court, "furnishes ample evidence that all interest was paid up to the date; for that fact is

(*y*) *Howcutt v. Bonser*, 3 Exch. 491.

expressly recited, and the date is within the twenty years" (z)

A similar provision as to the operation of an acknowledgment is contained in 37 & 38 Vict., c. 57 (Real Property Limitation Act, 1874), s. 8, with reference to contracts within the meaning of that section.

In the fourth place, if there have been a part payment, either of principal or interest, the time runs from such payment: this is by sect. 5 of 3 & 4 Will. IV., c. 42; and also by sect. 8 of 37 & 38 Vict., c. 57, as to cases within the latter section.

In the fifth place, if an action have been brought, and the defendant outlawed, or judgment obtained *against him, and arrested or reversed by writ of error, a new action may be commenced [*513] within a year after the reversal of the outlawry or of the judgment: this is by sect. 6 of 3 & 4 Will. IV., c. 42. But the importance of this enactment is much diminished by the abolition of outlawry in civil proceedings by 42 & 43 Vict., c. 59 (Civil Procedure Acts Repeal Act, 1879), s. 3.

Such is the statutable time of limitation in actions on specialties, which, you will have observed, is now either twenty years or twelve years, subject to the above exceptions. Now with regard to simple contracts:—

The limitation of time in cases of actions upon simple contracts, depends upon stat. 21 Jac. I., c. 16, which applies both to *assumpsit* and to *debt on simple contract*. The words of the Act are, "that all actions of

(z) *Forsyth v. Bristowe*, 22 L. J. (Ex.) 255; 8 Ex. 347, S. C. See *Morley v. Morley*, 5 De G. M. & G. 610; 25 L. J. (Ch.) 1; *Roddam v. Morley*, 25 L. J. (Ch.) 329; 2 K. & J. 336; reversed in 26 L. J. (Ch.) 428; 1 De G. & J. 1. See further *Thorne v. Kerr*, 25 L. J. (Ch.) 57; 2 Kay & J. 54; *Jortin v. S. E. Ry. Co.*, 24 L. J. (Ch.) 343; 6 De G. M. & G. 270; *Burrowes v. Gore*, 6 H. L. C. 907; *Dixon v. Holdroyd*, 27 L. J. (Q. B.) 43; 7 E. & B. (90 E. C. L. R.) 903; *Moodie v. Bannister*, 28 L. J. (Ch.) 881; 4 Drew. 433.

account, and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants (a)), and all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, shall be commenced and sued within six years next after the cause of such action or suit, and not after." ' *Assumpsit*, as I have explained to you, [*514] *was originally a species of action on the case (b). It therefore falls within the limitation prescribed by this statute, the period limited by which is, as just stated, *six years*.

All actions upon simple contracts must therefore be commenced within *six years*, unless they fall within certain classes excepted from the operation of the statute of James I.

In the first place that statute excepts (c) the five cases of the *person entitled to the action* being an infant, married, insane, imprisoned, or beyond seas at the time of the accruing of the right, and gives six years from the removal of the disability.

It had been doubted whether this proviso applied to the case of a foreigner living abroad, because if he came to England without having been here before, he could not be said to have *returned* from beyond seas, as it is expressed in this statute; and, consequently, there being no period from which the exceptional six years could, in this case, run, he was not within the proviso of the statute, and must therefore bring his action within six years from the time of the cause of action accruing. But the Common Pleas held that this was

(a) This exception is repealed. and merchants' accounts are subjected to the limitation of six years, by 19 & 20 Vict., c. 97, s. 9; see *post*, p. *537.

(b) *Battey v. Faulkner*, 3 B. & Ald. (5 E. C. L. R.) 294, per *Holroyd, J.*

(c) Sect. 7.

not so, and the Chief Justice *Jervis* said, "I do not think the fair meaning of the word 'return' is, to refer it to the coming back of persons who have been here *before; I think the meaning of the proviso is, [*515] that an action shall not be commenced after six years, but if the plaintiff was abroad when the right of action accrued, then when he comes to England the statute is to begin to run against him" (*d*).

But it has been thought expedient to take away this exception in favour of persons imprisoned or beyond seas; and by the statute 19 & 20 Vict., c. 97, s. 10, no person is entitled to any time beyond the period fixed by the previous enactment, *to commence* an action or suit, by reason of such person, or one or more of such persons, being at the time when such action or suit accrued beyond seas or imprisoned (*e*). This section has been held to be retrospective so far as to include causes of action that accrued before 19 & 20 Vict., c. 97, was passed (*f*).

In the second place, the statute of James I. also contains the exception, in the case of the defendant being outlawed (*g*), or the judgment reversed or arrested, which I have just cited with regard to actions upon specialties. Indeed, the one is copied from the other. However, as has already been *said, the importance of this exception is much diminished by [*516] the abolition of outlawry on civil process.

In the third place, if the *defendant* be beyond seas when the right accrued, the plaintiff has six years after

(*d*) *Lafond v. Raddock*, 22 L. J. (C. P.) 217; 13 C. B. (76 E. C. L. R.) 813, *S. C.*; *Strithorst v. Græme*, 3 Wils. 145; *Williams v. Jones*, 13 East, 439.

(*e*) See *Cornill v. Hudson*, 27 L. J. (Q. B.) 8; 8 E. & B. (92 E. C. L. R.) 429.

(*f*) *Cornill v. Hudson*, *supra*; *Pardo v. Bingham*, L. R. 4 Ch. 735, 39 L. J. (Ch.) 170.

(*g*) Sect. 4.

his return, not by the statute of James, but by stat. 4 Anne, c. 16, s. 19 (*h*); but it is a singular thing that "beyond seas" does not mean the same thing in this Act of Parliament as in the Acts of James and William IV.; for by 3 & 4 Will. IV., c. 42, s. 7, it is directed that no part of the United Kingdom, or of Guernsey, Jersey, Alderney, Sark, or Man, shall be considered beyond seas, within the meaning of that Act or of the Act of James I.; but, as the statute of Anne is not mentioned, it is held that the words "beyond seas" used in that Act retain their Common Law meaning, which was literally beyond the sea surrounding Great Britain. The Court of Exchequer, therefore, decided in *Lane v. Bennett* (*i*), that Ireland is not within the statute of Anne, and that the plaintiff had still six years in which to bring his action after the return of the defendant, who had been in that part of the United Kingdom ever since the cause of action accrued. But this condition of the statute law, although well worth observing, does not now exist, the Legislature having [*517] enacted in the statute *19 & 20 Vict., c. 97, s. 12, that these places shall be within the statute of Anne in like manner as they are within the 3 & 4 Will. IV., c. 42, s. 7. Such are the points of time from which Statutes of Limitation begin to run; and it must be remembered that in every case of a Statute of Limitations, if once the time of limitation begins to run, nothing that happens afterwards will stop it (*k*).

(*h*) *Fannin v. Anderson*, 7 Q. B. (53 E. C. L. R.) 811; *Townes v. Mead*, 24 L. J. (C. P.) 89; 16 C. B. (81 E. C. L. R.) 123.

(*i*) 1 M. & W. 70. See *Battersby v. Kirk*, 2 Bing. N. C. (29 E. C. L. R.) 584.

(*k*) *Smith v. Hill*, 1 Wils. 134; *Rhodes v. Smethurst*, 6 M. & W. 351; *Curling v. Earl of Mornington*, 26 L. J. (Q. B.) 181; 7 E. & B. (90 E. C. L. R.) 283; *Sturgis v. Darell*, 4 H. & N. 622; 6 Ib. 120 (Exch. Ch.); 28 L. J. (Ex.) 366; 29 Ib. 472.

There was, moreover, a very important distinction between co-plaintiffs and co-defendants. It is clear that a sole plaintiff might, if he chose, bring his action while abroad or wait till his return, when the statute began to run (*l*); and co-plaintiffs, if some were abroad and others in England, must have sued within six years from the cause of action accruing (*m*): but where one of two co-contractors who was a defendant, was beyond seas, the statute did not run till his return in the case of either of them; for it was decided (*n*), that although the statute commences to run when the right of action accrues, where there are several joint *claimants*, and one of them is within seas, yet *where there were joint *debtors*, and one of them was abroad [*518] when the cause of action arose, the statute did not begin to run until his return in the case of any of them. This distinction between the position of co-plaintiffs and co-defendants was founded upon the wording of the 19th section of the statute of Anne, c. 16, compared with the 21 Jac. I., c. 16; and the reason of it seems to be, that one plaintiff could act for others and use their names in an action, and therefore the protection of the statute was not wanted. With respect to defendants, however, the reason did not apply; the plaintiff might not be able to bring the absent defendant into Court by any act of his, and therefore, if he were compelled to sue those who were within seas without joining those who were abroad, he might possibly recover against insolvent persons, and lose his remedy against the solvent ones who were absent. On the other hand, if he sued out a writ against all, and either continued it without declar-

(*l*) *Le Veux v. Berkeley*, 5 Q. B. (48 E. C. L. R.) 836.

(*m*) 2 Wms. Saund. 121. See *Perry v. Jackson*, 4 T. R. 516; *Strithorst v. Græme*, 3 Wils 145.

(*n*) *Fannin v. Anderson*, *supra*.

ing, or proceeded to outlawry against the absent parties, and declared against those within seas, he was placed in precisely the same situation as if the statute of Anne had never passed, and was obliged to incur fruitless expense, the avoiding of which seems to have been the object of the statute of Anne. But this evil is remedied by the statute so often cited, and now the Statutes of Limitations before mentioned (including 3 & 4 Will.

[*519] IV., c. 42, s. 3) run as to the joint debtor *who is not beyond seas, from the time when the action or suit accrued; but there is no bar from commencing an action, &c., against a joint debtor who was beyond seas, after his return, by reason of judgment having been recovered against another who was not beyond seas (*o*).

It seems also that if, after the Statute of Limitations has begun to run, the right to sue and the liability to be sued, meet in the same person by any act of the law, as where a debtor to the deceased becomes his administrator, the running of the statutes is suspended while they so continue (*p*).

In the fourth place, if the defendant have given an acknowledgment *by writing signed*, the protection of the statute is removed. After the passing of the statute of James, and until Lord Tenterden's Act, which I shall immediately mention, an acknowledgment by mere *words* would have been sufficient; but by sect. 1 of that Act, which is the 9 Geo. IV., c. 14, the acknowledgment must be in *writing*, "signed by the party chargeable." It enacts "that no acknowledgment or promise *by words only* shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of

(*o*) 19 & 20 Vict., c. 97, s. 11; *King v. Hoare*, 13 M. & W. 494.

(*p*) *Seagram v. Knight*, 36 L. J. (Ch.) 918; L. R. 2 Ch. 628; *Mills v. Borthwick*, 35 L. J. (Ch.) 31.

*the operation of the said enactments (*q*), or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments (*q*), or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by *any other or others of them*; provided always, that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever; provided also, that in actions to be commenced against two or more joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such *defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.”

No part of Lord Tenterden's Act has given rise to more litigation than this saving clause; but it is now settled that the acknowledgment, in order to bar the Statute of Limitations, must, except in the case afterwards mentioned of a conditional promise which has become absolute by the performance of the condition,

(*q*) *I. e.* 21 Jac. 1, c. 16, the English Statute of Limitations, and 10 Car. 1, sess. 2, c. 6, a similar enactment for Ireland.

contain an unconditional promise to pay. Such promise need not indeed be express, but the law will imply it from an acknowledgment of the debt, provided it be an acknowledgment or admission so distinct that a promise to pay may be *reasonably* inferred from it (r).

[*522] Many of the older cases display a different doctrine (s). *These, however, are expressly overruled by the leading case of *Tanner v. Smart* (t), where, in an elaborate judgment, Lord *Tenterden*, C. J., says, "The only principle upon which it (an acknowledgment) can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and as such constitutes a new cause of action, and supports and establishes the promise which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; when it does not support them, *though it may show clearly that the debt has never been paid, but is still a subsisting debt*, the plaintiff fails." This decision was based chiefly on that of *Heyling v. Hastings* (u), one of the oldest cases on the Statute of Limitations, and has been recognized

(r) *Collis v. Stack*, 26 L. J. (Ex.) 138; 1 H. & N. 605; *Holmes v. Mackrell*, 3 C. B. (N. S.) (91 E. C. L. R.) 789; *Godwin v. Culley*, 4 H. & N. 373; *Holmes v. Smith*, 8 Ir. (Com. Law Rep.) 424; *Cornforth v. Smithard*, 29 L. J. (Ex.) 228; *Bourdin v. Greenwood*, L. R. 13 Eq. 281; 41 L. J. (Ch.) 73. "It has been established by *Tanner v. Smart*, and similar cases, that a mere acknowledgment will be insufficient, if the debtor states either that he will not pay, or that he will pay only upon a condition which remains unfulfilled, or at a time which has not elapsed. Beyond establishing this principle, I do not think that much assistance is to be obtained from a perusal of the cases, for one carelessly written letter is not of much use in construing another." *Per Bramwell*, 1. J., in *Meyerhof v. Froehlich*, 4 C. P. D. (C. A.) 63, 65; 48 L. J. (Q. B. etc.) 43, 45.

(s) *Yea v. Fouraker*, 2 Burr. 1099; *Thornton v. Illingworth*, 2 B & C. (9 E. C. L. R.) 824.

(t) 6 B. & C. (13 E. C. L. R.) 603; *Turney v. Dodwell*, 23 L. J. (Q. B.) 137; 3 E. & B. (77 E. C. L. R.) 136, *S. C.*

(u) *Comyn*, 54; *Salk*. 29, *S. C.*

and cited in almost every subsequent case on the point (x).

As long as the doctrine prevailed, that it sufficed to show an acknowledgment which rebutted the presumption arising from the lapse of time that the [*523] *claim was satisfied, it was not only immaterial whether a promise were made or not, but a condition with which such promise, if made, might chance to be coupled, would nowise have defeated the effect and virtue of the acknowledgment: for the acknowledgment was held to be in itself a bar to the statute, and no promise, either express or implied, was required. In *Dowthwaite v. Tibbut* (y), the debtor said, he “*would not*,” and in *Leaper v. Tatton* (z), he “*could not*” pay; and yet in both they were held to have sufficiently admitted the debt. But according to the doctrine now adopted from *Tanner v. Smart*, any conditional promise defeats the acknowledgment (unless, indeed, the condition be shown to have been performed): so that, however strongly the debt may be admitted, unless there be a promise to pay it, express or implied, it cannot be enforced. Lord *Tenterden* said, in *Tanner v. Smart*, “Upon a general acknowledgment, *where nothing is said to prevent it*, a promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule ‘*Expressum facit cessare tacitum*’ prevail?” So rigorously has this been followed, that, in the case of *Hart v. Prendergast* (a), the following *written state- [*524] ment was held an insufficient “acknowledg-

(x) *Morrell v. Frith*, 3 M. & W. 402; *Bateman v. Pinder*, 3 Q. B. (43 E. C. L. R.) 574; *Hurst v. Parker*, 1 B. & Ald. 92; *Cripps v. Davis*, 12 M. & W. 159; *Hart v. Prendergast*, 15 L. J. (Ex.) 223; 14 M. & W. 741, *S. C.*; *Williams v. Griffith*, 3 Ex. 335.

(y) 5 M. & Sel. 75.

(z) 16 East, 420.

(a) *Supra*.

ment *or* promise" to satisfy the statute: "I will not fail to meet Mr. H. (the plaintiff) on fair terms, and have now a hope that before, perhaps, a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance." *Pollock*, C. B., there says, "It is not sufficient that the document contains a promise by the defendant to pay *when he is able, or by bill*, or a mere *expectation* that he shall pay at some future time; it should contain either an unqualified promise to pay, that is, a promise to pay *on request*, or if it be a conditional promise, or a promise to pay on the arrival of a certain period, the performance of the condition or the arrival of that period should be proved by the plaintiff. The only question in the present case is, whether this letter contains a promise to pay the debt on request. Now, certainly, it does not in terms contain such a promise" (*b*). On the other hand, a letter containing these words, "I will try to pay you a little at a time if you will let me. I am sure that I am [*525] anxious to get out of your debt. I *will endeavour to send you a little next week:" has been held sufficient, as an unequivocal acknowledgment, not limited by a refusal or any other qualifying statement (*c*).

This doctrine as to conditional ability has been carried further, on the authority of *Tanner v. Smart*, in

(*b*) See also *Spong v. Wright*, 9 M. & W. 629; *Morrell v. Frith*, *supra*; and *Cripps v. Davis*, 12 M. & W. 159; *Bush v. Martin*, 33 L. J. (Ex.) 17; *Cock-erill v. Sparke*, 32 L. J. (Ex. 118; *Banner v. Berridge*, 18 Ch. Div. 254; 50 L. J. (Ch.) 630; *Green v. Humphreys*, 26 Ch. Div. 474; 53 L. J. (Ch.) 625; reversing *S. C.*, 23 Ch. Div. 207; 52 L. J. (Ch.) 659.

(*c*) *Lee v. Wilmot*, L. R. 1 Ex. 364; 35 L. J. (Ex.) 175. See also *Chasemore v. Turner*, L. R. 10 Q. B. 500, 45 L. J. (Q. B., etc.) 66; *Quincey v. Sharpe*, 1 Ex. D. 72, 45 L. J. (Q. B., etc.) 347; *Skeet v. Lindsay*, 2 Ex. D. 314, 46 L. J. (Q. B., etc.) 249.

the case of *Waters v. Earl of Thanet* (*d*), where the defendant gave an acknowledgment of certain overdue bills of exchange in a memorandum thus worded: "I hereby debar myself of all future plea of the Statute of Limitations in case of my being sued for the recovery of the amounts of the said bills and of the interest accruing thereon at the time of my being so sued; and I hereby promise to pay them, separately or conjointly, with the full amount of legal interest on each or both of them, whenever my circumstances may enable me to do so, and I may be called upon for that purpose." Now in this case the defendant had become able to pay the bills above six years before the action was brought; but the plaintiff was ignorant of it. But it was decided, that when a debtor protected by the statute promises to pay whenever he may be able, the creditor is expected to be on the watch, and when he brings his action *must prove the ability which revives his right. [*526] The period at which it is revived is that of the fact taking place, *not* of his becoming acquainted with it.

These decisions have been thought unsupported by the case of *Heyling v. Hastings*, from which that of *Tanner v. Smart* derived its authority, and even at variance with it: the words there used by the debtor were, "Prove it, and I will pay you:" and it was held, that "the promise, *though conditional*, shall bring it back within the statute, *for the defendant waives the benefit of the Act as much as by an express promise*;" and *Holt*, C. J., having reserved the point, ten judges conferred and approved of the judgment; adding, that if the creditor proved the delivery of the goods, which he might do *at the trial*, it would suffice to take the case out of the statute (*e*). The law, however, seems

(*d*) 2 Q. B. (42 E. C. L. R.) 757.

(*e*) 1 Ld. Raym. 398, and 421; Salk. 29, S. C.

settled (*f*): and in a more recent case it was held that although a simple acknowledgment of the debt, without any qualification, may be sufficient to bar the Statute of Limitations, because the law will infer a promise to pay the debt; yet if there be anything to qualify the acknowledgment or make it doubtful it is not [*527] *sufficient. Therefore, where there was merely a proposal that if so much was allowed on one side so much should be allowed on the other, and, independently of such condition, there was no acknowledgment of the debt, it was considered to be no bar to the statute (*g*). Similarly it would seem, though it is not, it is believed, expressly decided, “that a letter,” to quote the words of *Mellish*, L. J. (*h*), “which is stated to be without prejudice cannot be relied upon to take a case out of the Statute of Limitations, for it cannot do so unless it can be relied upon as a new contract. Now if a man says his letter is without prejudice, that is tantamount to saying ‘I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all.’ It appears to me, not on the grounds of bad faith, but on the construction of the document, that when a man says in his letter it is to be without prejudice, he cannot be held to have entered into any contract by it if the offer contained in it is not accepted.”¹

(*f*) *Smith v. Thorne*, 21 L. J. (Q. B.) 199; 18 Q. B. (83 E. C. L. R.) 134, Ex. Ch.; *Rackham v. Marriott*, 26 L. J. (Ex.) 315; 2 H. & N. 196 (Ex. Ch.); *Hughes v. Paramore*, 24 L. J. (Ch.) 681; *Everett v. Robertson*, 28 L. J. (Q. B.) 23.

(*g*) *Francis v. Hawkesley*, 28 L. J. (Q. B.) 370; *Goate v. Goate*, 1 H. & N. 29; *Buckmaster v. Russell*, 10 C. B. (N. S.) (100 E. C. L. R.) 745.

(*h*) *In re River Steamer Co., Mitchell's claim*, L. R. 6 Ch. 831.

¹ *Bell v. Morrison*, 1 Peters, 351; *Barlow v. Barnes*, 1 Dillon, 418; *Crawford v. Childress*, 1 Ala. N. S. 482; *Worthington v. De Bardlekin*, 33 Ark. 651; *Walker v. Griggs*, 32 Ga. 119; *Sumner v. Sumner*, 1 Metc. 394; *Richardson*

If the evidence be of a promise to pay on condition, and the condition be performed, it becomes absolute, and is a promise to pay on request. For instance, where the acknowledgment was, "I am *in receipt of your letter of the 6th, handed me this morning. I have forwarded it to Mrs. J., with a request she will come over without delay to settle the business. May I beg you will write to her by the first post to press payment, and what she may be short I will assist to make up. I send you her address." This was held sufficient, it having been proved on behalf of the plaintiff that Mrs. J. had been applied to on his part for payment, but without effect (*i*).¹ [*528]

In short, where Lord Tenterden's Act is satisfied by a writing duly signed, "there must be one of these three things to take the case out of the Statute [of Limitations]. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt, or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed" (*k*).

It has been also held, that an acknowledgment may *primâ facie* satisfy the statute, but that other evidence is admissible to rebut such inference; such, for example, as shows that a document was *drawn [*529]

(*i*) *Humphreys v. Jones*, 14 M. & W. 3, *per Parke*, B.

(*k*) *In re River Steamer Co.*, *supra*, *per Mellish*, L. J., at p. 828. See also, as to the duty of the plaintiff to show that the condition has been performed, *per Pollock*, C. B., in *Hart v. Prendergast*, 14 M. & W. 741, 745, *ante*, p. *524.

v. Thomas, 13 Gray, 381; *Ten Eyck v. Wing*, 1 Mich. 74; *McDonald v. Grey*, 29 Tex. 80.

¹ *Leigh v. Linthicum*, 30 Tex. 100; *Aldrete v. Demitt's Heirs*, 32 Ib. 575; *Lafarge v. Jayne*, 5 Pa. St. 410; *Mattocks v. Chadwick*, 71 Me. 313; *Tompkins v. Brown*, 1 Den. 247.

up with a view to the debt being paid in a particular way (*l*).

It is not necessary that the sum due should be named : but if there is an unequivocal admission of the debt, and a difference only upon the amount, the operation of the statute is barred (*m*).

Whether an acknowledgment is a sufficient admission or not to take a case out of the statute, being substantially a question of the construction of a written document, is for the judge and not the jury (*n*).

The promise or acknowledgment must, in all cases, be made before action is brought ; it is unavailable if made afterwards (*o*).

As observed before (*p*), the Court of Common Pleas decided in *Hyde v. Johnson* (*q*) that, there being no mention of an agent, a signature by an agent was not sufficient for the purpose, so that it is curious enough to observe, that while under this Act a man's agent could not bind him by the acknowledgment of a simple contract debt, yet under 3 & 4 Wm. IV., c. 24, s. 5 (*r*), the agent may do so by acknowledging a bond debt [*530] which is a contract *of so much more importance in the eye of the law. But this anomaly has been removed, and the signature of an agent, both within this statute and the 16 & 17 Vict., c. 113 (Irish Com. L. Procedure Act), ss. 24 and 27, is now sufficient (*s*).

(*l*) *Cripps v. Davis*, 12 M. & W. 159. See *Collinson v. Margesson*, 27 L. J. (Ex.) 305.

(*m*) *Waller v. Lacy*, 1 M. & Gr. (39 E. C. L. R.) 54; *Gardner v. McMahon*, 3 Q. B. (43 E. C. L. R.) 561.

(*n*) *Sidwell v. Mason*, 26 L. J. (Ex.) 407; 2 H. & N. 306.

(*o*) *Bateman v. Pinder*, 3 Q. B. (43 E. C. L. R.) 574.

(*p*) *Ante*, pp. *405, *406.

(*q*) 2 Bing. N. C. (29 E. C. L. R.) 776.

(*r*) *Ante*, p. *510.

(*s*) 19 & 20 Vict., c. 97, s. 13.

There is still another and a fifth exception. This arises from a clause in Lord Tenterden's Act, which exempts from the operation of that Act the effect of any payment, whether of principal or interest. Before Lord Tenterden's Act, a part payment, whether of principal or interest, had the effect of taking the debt in respect of which it was paid out of the operation of the Statute of Limitations (*t*), and therefore will have the same effect since (*u*). Indeed, from the case of *Whitcomb v. Whiting* just cited, you will see that where there were several joint debtors, payment by one took the debt out of the operation of the statute *as against the others*. But it has been enacted, that for the future part payment by one shall not deprive another of the benefit of the enactments of the Statute of Limitations (*x*).

*There have been many decisions as to what [531] is a sufficient payment to bar the statute, of which some notice is expedient. In *Bateman v. Pinder* (*y*), *Wightman, J.*, said, "Part payment is an acknowledgment, and an acknowledgment, though not a promise in terms, may amount to one virtually; but, where it is not made till after action brought, it cannot prevent the operation of the statute." Part payment by an agent must therefore be by such an agent as is authorized to make such payment by the parties to be bound by this act of his; and, therefore, if made by a

(*t*) *Whitcomb v. Whiting*, Dougl. 652; *Goddard v. Ingram*, 3 Q. B. (43 E. C. L. R.) 839

(*u*) *Wyatt v. Hodson*, 8 Bing. (21 E. C. L. R.) 309; *Channel v. Ditchburn*, 5 M. & W. 494; *Bamfield v. Tupper*, 7 Exch. 27; *Fordham v. Wallis*, 22 L. J. (Chanc.) 548. And see *In re Rutherford*, *Brown v. Rutherford*, 14 Ch. Div. 687; 49 L. J. (Ch.) 654, reversing *Ib.* 345.

(*x*) 19 & 20 Vict., c. 97, s. 14. *Thompson v. Waithman*, 26 L. J. (Ch.) 134; 3 Drew. 628; *Jackson v. Woolley*, 27 L. J. (Q. B.) 448 (Ex. Ch.), reversing *Ib.* 181; *Ridd v. Moggridge*, 2 H. & N. 567.

(*y*) 3 Q. B. (43 E. C. L. R.) 574.

receiver appointed by the Court of Chancery without the sanction of such parties, his payments do not amount to any acknowledgment by them, and do not against them take the case out of the statute (z). And this part payment may be made by a bill, as well as by money, for the statute intending to make a distinction between mere acknowledgments by word of mouth, and acknowledgments proved by the act of payment, it cannot be material whether such payment be afterwards avoided by the thing turning out to be worthless. The intention and the act by which it is evinced remain the same. The word payment must be taken to be used by the Legislature in a popular sense large enough to include *the species of payment by a bill (a). [*532] Part payment of interest equally suffices (b). But payment of interest under compulsion of law is not sufficient to take the principal debt out of the operation of the Statute of Limitations, for it is not such a payment that a promise to pay the principal can be in fact inferred from it. On this ground, where within six years before action the plaintiff had sued the defendants for interest upon a note made payable with interest, and the defendants defended the suit, the plaintiff recovered judgment for the interest claimed, and the defendants thereupon paid the amount recovered, this payment was held insufficient(c). Nor is it essential that money or a bill should actually pass; for the statement of a mutual settlement of account between the parties is equivalent to a payment if the party to whom the debt is owing agree that it shall be paid by the setting off of the same amount, so that the sum set off is evidence of

(z) *Whitley v. Lowe*, 2 De G. & J. 704.

(a) *Turney v. Dodwell*, 23 L. J. (Q. B.) 137; 3 E. & B. (77 E. C. L. B.) 136.

(b) *Dowling v. Ford*, 11 M. & W. 329.

(c) *Morgan v. Rowlands*, L. R. 7 Q. B. 493; 41 L. J. (Q. B.) 187.

payment, if the party against whom it is set off did not object to it when his account was settled (*d*). The principle of this is, that the going through an account with items on both sides, and striking a balance, converts a set-off into a payment, and is a *trans- [*533] action out of which a new consideration may be said to arise (*e*). That money also need not actually pass, is shown by the following case. After a debt due to the plaintiff from his son had been barred by the statute, the plaintiff, his son, and his son's wife, had an interview at which the interest was calculated. The plaintiff's son then put his hand into his pocket as if to get out the money to pay it. The plaintiff stopped him, and writing a receipt for the interest, gave it to his son's wife, saying that he would make her a present of the money. No money actually passed between the parties, but the transaction was held to be a sufficient payment to take the debt out of the Statute of Limitations (*f*).

Where a specific sum of money is due, as upon a promissory note, the mere fact of a payment of a smaller sum by the debtor to the creditor is some evidence of a part payment to take the case out of the Statute of Limitations (*g*). The object and effect of such payments are rather matters of evidence than of law (*h*); as where a party, on being applied to for interest, paid a sovereign, and said he owed the money but would not pay it, it was considered to be a question for the jury to say *whether he intended to re- [*534] fuse payment, or merely spoke in jest (*i*). The

(*d*) *Scholey v. Walton*, 12 M. & W. 510.

(*e*) See also *Ashby v. James*, 11 M. & W. 542.

(*f*) *Maber v. Maber*, L. R. 2 Ex. 153; 36 L. J. (Ex.) 70.

(*g*) *Burn v. Boulton*, 15 L. J. (C. P.) 97; 2 C. B. (52 E. C. L. R.) 476, *S. C.*

(*h*) *Nash v. Hodgson*, 23 L. J. (Chanc.) 780.

(*i*) *Wainman v. Kynman*, 1 Exch. 118.

question will always turn upon the distinction between cross demands and set-off on the one hand, and part payment on the other, a distinction clear enough in principle, but dependent for its application on facts and therefore not always applicable with ease (*k*).

On the construction of this part of Lord Tenterden's Act, the case of *Waters v. Tompkins* (*l*) contains the following important observations, with which this exception will be amply explained:—"On the first perusal of the first clause of Lord Tenterden's Act, it would seem that the proviso takes the case of part payment of principal, or payment of interest, out of the operation of the statute altogether; and therefore, that these facts would not only have the same effect, but might be proved exactly in the same way that they would have been, if the Act had not passed; and consequently, by the defendant's parol admission, which species of proof of a simple fact is not exposed to the same degree of danger as attended the admission of acknowledgments of the debt itself. But the Court of Exchequer, in the case of *Willis v. Newham* (*m*), decided that the verbal acknowledgment of part payment of a debt was insufficient [*535] *and they construed the act as containing a general provision, that, in *no case* should an acknowledgment or promise by words *only* be sufficient to take the case out of the Statute of Limitations, whether such acknowledgment were of the existence of the debt, or of the fact of part payment; and they considered the proviso as *leaving* to the fact of part payment, *if properly proved*, that is, *not by an acknowledgment only*, the same effect which it had before the statute.

(*k*) *Worthington v. Grimsditch*, 15 L. J. (Q. B.) 52; 7 Q. B. (53 E. C. L. R.) 479, S. C.; *Waugh v. Cope*, 6 M. & W. 824.

(*l*) 2 Cr. M. & R. 726.

(*m*) 3 Y. & J. 518.

And this construction of the Act certainly extends the remedy, and obviates the mischief to be guarded against, in a greater degree than the words taken in their ordinary sense would do. But if part payment, or payment of interest, is proved in any legal mode, and not by admission *only*, this case is no authority that such proof is not sufficient. The Act of 9 Geo. IV., as explained by that case, does not prohibit or qualify the ordinary mode of legal proof in any respect, save that it requires something *more* than *mere* admission. The meaning of *part payment* of the principal, is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum*, due from the person making the payment to him to whom it is made; which part payment implies an admission of such greater sum being then due, and a promise to pay it: and the reason why the effect of such a payment is not lessened by the Act is, that it is not a *mere* acknowledgment *by words, but it [*536] is coupled with a fact. The same observation applies to the payment of interest. But if the payment of a sum of money is proved as a fact, and not by a mere admission, there is nothing which requires the appropriation to a particular account to be proved by an express declaration of the party making it at the time; such appropriation may be shown by any medium of proof, and many instances might be put of full and cogent proof of such appropriation, where nothing was said at the time by the debtor; as for example, if the day before the debtor had called and informed the creditor that he would, the day after, send his clerk with a specific sum, on account of the larger debt, then described, for which the action was brought, and should require a receipt for it, and the clerk did pay that specific sum, and took the creditor's receipt, expressly

stating the account on which it was received, and delivered it to his employer; there could be no doubt that such evidence would not only be admissible, but, if distinctly proved, at least as satisfactory as a declaration accompanying the act of payment." After considering attentively the reasoning here quoted, the student will be prepared to hear, that by a subsequent case, in which the Court of Exchequer Chamber distinctly overruled *Willis v. Newham*, it was decided that as regards the evidence of payment, an *admission* of payment suffices, *although not in writing, but merely by [*537] word of mouth (*n*).¹

The sixth exception to which I have to advert is that arising out of the exception in the statute of James the First, of accounts between merchant and merchant. I advert to this only for the purpose of showing that this exception, like several others, has been abrogated by the

(*n*) *Cleave v. Jones*, 20 L. J. (Exch.) 238; 6 Exch. 573, *S. C.* in Exch. Ch.

¹ Upon the effect of payment of part, either principal or interest, see *Arnold v. Downing*, 11 Barb. 554; *Smith v. Simms*, 9 Ga. 418; *Evans v. Smith*, 34 Me. 33; *Jones v. Jones*, 21 N. H. 219; *Whipple v. Stevens*, 22 Ib. 219; *Sibley v. Phelps*, 6 Cush. 172; *Bell v. Crawford*, 8 Grat. 110; *Biscoe v. Stone*, 11 Ark. 39; *Wood v. Wylds*, Ib. 754; *Chambers v. Walker*, 4 Rich. 548; *McCullough v. Henderson*, 24 Miss. 92; *Anderson v. Robertson*, Ib. 389; *Carroll v. Forsyth*, 69 Ill. 127; *Merritt v. Day*, 38 N. J. 32; *Torrence v. Strong*, 4 Or. 39; *Anderson v. Baxter*, Ib. 105; *English v. Wathen*, 9 Bush, 387; *U. S. v. Wilder*, 13 Wall. 254; *Hopkins v. Stout*, 6 Bush, 375; *Egery v. Decrew*, 53 Me. 392; *Dyer v. Walker*, 54 Ib. 18; *Thorn v. Moore*, 21 Iowa, 285; *Eaton v. Gillet*, 17 Wis. 435. A part payment made on Sunday will not take the debt out of the statute: *Clapp v. Hale*, 112 Mass. 368. An acknowledgment or new promise made on Sunday will remove the bar: *Thomas v. Hunter*, 29 Md. 406. A partial payment on a joint and several promissory note, by one of several makers, will not prevent the running of the statute as to the other makers: *Hunter v. Robertson*, 30 Ga. 479; *Hance v. Hair*, 25 Ohio St. 349; *contra*, *Merrill v. Day*, 38 N. J. 32; *Block v. Dorman*, 51 Mo. 31; *Pitts v. Hunt*, 6 Lans. 146; *Corlies v. Fleming*, 30 N. J. 349. And see also *Rogert v. Vermilya*, 10 Barb. 32; *Ellicott v. Nichols*, 7 Gill, 85; *Whipple v. Stevens*, 22 N. H. 219; *Balcom v. Richards*, 6 Cush. 360; *Reid v. McNaughton*, 15 Barb. 168; *Tillinghast v. Nourse*, 14 Ga. 641. A part payment derived from a collateral security is not sufficient: *Harper v. Fairley*, 53 N. Y. 442.—s.

statute 19 & 20 Vict., c. 97, s. 9. And now "all actions of account or for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen, then within six years after the passing of this Act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit" (o).

Lastly, if the accruer of the cause of action have been fraudulently concealed by the person liable, it seems now that in most cases the statute will not begin to run till the discovery of the fraud. *This was not the doctrine of the Common Law as laid down [*538] in the most recent cases; for there it was held that the accruing of the cause of action being the point from which the time begins to run within which an action may be brought, even the concealment of the accruing of the cause of action did not prevent this time from beginning to run from the same point, and that even the fraudulent concealment of the fact would not prevent the period of limitation from elapsing (p). In the Courts of Chancery (q), in most cases, this injustice would have been prevented,—a difference in the administration of the law, arising from the different modes

(o) See *Inglis v. Haigh*, 8 M. & W. 769; *Cottam v. Partridge*, 4 M. & Gr. (43 E. C. L. R.) 271; *Knox v. Gye*, L. R. 5 H. L. 656; 42 L. J. (Ch.) 234 (H. L.).

(p) *Imperial Gas Co. v. London Gas Co.*, 23 L. J. (Ex.) 303; 10 Ex. 39, S. C. See *Hunter v. Gibbons*, 26 L. J. (Ex.) 1; 1 H. & N. 459.

(q) *Blair v. Bromley*, 5 Hare, 542; 16 L. J. (Ch.) 105; affirmed on appeal, 2 Phil. 354.

of administering relief which prevailed in those Courts. Since the Judicature Acts came into force the doctrine of the latter Courts has, as might have been expected, prevailed (*r*). Accordingly, a majority of the Court of Appeal (affirming the judgment of *Field*, J., in the Court below) has recently held that in an action to [*539] *recover by way of damages money lost by the fraudulent representations of the defendant, a reply to the defence of the Statute of Limitations that the plaintiff did not discover and had not reasonable means of discovering the fraud within six years before the action, and that the existence of such fraud was fraudulently concealed by the defendant until within such six years, was held good (*s*).

There are a few other rules applicable alike to every species of contract, and which it is convenient to notice in a work treating like this of the general principles of the law of contracts. These are the rules according to which contracts are construed in courts of justice, and the student will probably find them deserving of much interest when he observes that they are not merely conventional rules of law, but are the canons by which all writings of every description are construed, and by which the meaning and intention of men are ascertained (*t*), when that meaning and intention are indicated not by their words or writings only, but by their actions and conduct also.¹

(*r*) See 36 & 37 Vict., c. 66 (Judicature Act, 1873), s. 24, as to the power of the High Court and Court of Appeal in all cases to give equitable relief and recognize equities. Moreover by sect. 25, sub-s. 11, of the same Act, the general rule is that where "there is any conflict between the rules of Equity and the rules of Common Law with reference to the same matter, the rules of Equity shall prevail."

(*s*) *Gibbs v. Guild*, 9 Q. B. D. (C. A.) 59; 51 L. J. (Q. B.) 313; affirming 8 Q. B. D. 296; 51 L. J. (Q. B.) 228.

(*t*) *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363; *ante*, p. *50.

¹ *White v. Booker*, 4 Metc. (Ky.) 267; *Springsteen v. Samson*, 32 N. Y. 538

It is obviously of the utmost importance that these rules of construction should be applied with consistency, and indeed, as far as practicable, with uniformity. In order to secure the attainment of *these objects, the construction of all written instruments belongs to the Judges, who may reasonably be expected to apply with uniformity the rules with which they are by study and experience familiar, and not to the jury, whose habits of mind and experience are necessarily different and various, and who, in many cases not being familiar with the rules, and in all cases practically unacquainted with their application, cannot reasonably be expected to apply them with uniformity. [*540]

The construction of all written instruments, therefore, belongs to the court alone (*u*), whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art or phrases of commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject

(*u*) *Nielson v. Harford*, 8 M. & W. 823. See *Smith v. Thompson*, 8 C. B. (65 E. C. L. R.) 44; *Skull v. Glenister*, 33 L. J. (C. P.) 185.

703; *Hunter v. Anthony*, 8 Jones, 385; *Rose v. Roberts*, 9 Minn. 119; *Karmuller v. Krotz*, 18 Iowa, 352; *Salmon Falls Co. v. Portsmouth Co.*, 46 N. H. 249; *Peckham v. Haddock*, 36 Ill. 38; *Chicago v. Sheldon*, 9 Wall. 50; *Caldwell v. Layton*, 44 Mo. 220; *People v. Gosper*, 3 Neb. 285. When in a contract words of a doubtful meaning or application are used, the practical construction given to them during a series of years by the parties to the contract should prevail: *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121; *Reading v. Gray*, 37 N. Y. (Super. Ct.) 79; *Stapenhorst v. Wolff*, 35 Ib. 25.—s.

of redress in a court of appeal; but a misconstruction by the jury cannot be set *right at all effectually. A very good example of what is here said, as well as a clear statement of the rules of construction which the Judges apply, is furnished in the case of *Simpson, v. Margitson* (x); where the plaintiff, an auctioneer, had been employed to sell an estate upon the terms of a letter from the defendant to him, which contained these words:—"the terms upon which the sale of the North Cove estate is offered to you are £1 per cent. upon the purchase-money; that to include every expense, and to be paid if sold by auction or within two months after; half per cent. if not sold at auction, or within two months after upon a reserved price." The defendant contended, that month in temporal matters meant lunar month; unless either from the context or from the usage in a trade, business, or place, it is made to appear that the parties intended another meaning; and nothing of the sort appearing in that case, that it was the duty of the Judge to have construed the contract and decided against the plaintiff. "If the context," said the Court, "shows that calendar months were intended, the Judge may adopt that construction (y). If the surrounding circumstances at the time when the instrument was made show that the parties intended to use the word not in its primary or strict sense, but in some secondary *meaning, the Judge may construe it from such circumstances according to the intention of the parties (z). If there is evidence that the word was used in a sense peculiar

(x) 11 Q. B. (63 E. C. L. R.) 23.

(y) *Lang v. Gale*, 1 M. & Sel. 111; *Regina v. Chawton*, 1 Q. B. (41 E. C. L. R.) 247.

(z) *Goldshede v. Swan*, 1 Ex. 154; *Walker v. Hunter*, 2 C. B. (52 E. C. L. R.) 324; *Bacon's Maxims*, Reg. 10; *Mallan v. May*, 13 M. & W. 511; *Beckford v. Crutwell*, 1 M. & R. 187.

to a trade, business, or place, the jury must say whether the parties used it in that particular sense (*a*). If the meaning of a word depends upon the usage of the place where anything under the instrument is to be done, evidence of such usage must be left to the jury (*b*). Also, the jury may have to give the meaning of some technical words. But the present is not within either of the above principles; nor can we find any authority for saying that the conduct of the parties to a written contract is alone admissible evidence to withdraw the construction of a word therein, of a settled primary meaning, from the Judge, and to transfer it to the jury."

It would have appeared needless to remark that the same sense is to be put upon the words of a contract in an instrument under seal, as would be put upon the same words in any instrument not under seal, if the question had not actually been raised in argument; for the same intention *will be expressed by the [543] same words in a contract in writing whether with or without seal. Nor can it signify in what court the instrument is construed; for the question, what is the meaning of the contract, cannot be affected by the question, what is to be the consequence of the contract, or what the remedy for the breach, or by any other matter in which the *practice* of the courts may differ. The rule of construction, therefore, must be the same, whether in a civil or a criminal court, or whether in a court of law or equity.

In the first place, it is the most important of all the rules of construction, that the whole of the agreement is to be considered. This is so reasonable and clear,

(*a*) *Smith v. Wilson*, 3 B. & Ad. (23 E. C. L. R.) 728; *Grant v. Maddox*, 15 M. & W. 737; *Myers v. Sarl*, 3 E. & E. 306; 30 L. J. (Q. B.) 9.

(*b*) *Robertson v. Jackson*, 2 C. B. (52 E. C. L. R.) 412; *Bourne v. Gatliff*, 11 Cl. & F. 45. See *Hitchin v. Groom*, 5 C. B. (57 E. C. L. R.) 515.

that no explanation is required of it; for obviously it cannot be the intention of the parties to an agreement with stipulations or qualifications, that some of them should be altogether disregarded, and a part of the agreement magnified into an equality with the whole; but, on the contrary, such a meaning is to be given to particular parts as will, without violence to the words, be consistent with all the rest, and with the evident object and intention of the contracting parties.

The case of *Monypenny v. Monypenny* (c), decided [*544] by Lord Chancellor *Ghelmsford*, contains "one of the most luminous judgments to be found in the books on this most important rule, and deserves so much attention that I have here stated it at some length. Phillips Monypenny vested a term of 100 years in trustees for the better security of the payment of a rent-charge, being his wife's jointure. Phillips Monypenny died in 1841. After his death it was discovered that of the principal part of the property charged with the annuity, Phillips Monypenny was only tenant for life, and on his death it became another's. As the charge upon the land of which he was such tenant ceased, it became material to inquire whether there was any covenant in the deed to bind his personal representatives. One of the Vice-Chancellors, assisted by two of the Common Law Judges, decided that there was no such covenant, and the case was reconsidered, on appeal, by Lord Chancellor *Chelmsford*.

"The learned barons," said the Lord Chancellor, "who assisted the Vice-Chancellor in putting a legal construction on the deed, were clearly of opinion that there were no words in it creating a covenant. They

(c) 28 L. J. (Ch.) 303; 31 L. J. (Ch.) 269; and 9 H. L. C. 114; *M'Intyre v. Belcher*, 32 L. J. (C. P.) 254; 14 C. B. (N. S.) (108 E. C. L. R.) 654.

examined the recital, grant, and the power of distress in succession, and dismissed each of them in its turn, with the remark that it did not operate as a covenant. Even the strong and appropriate words used in the creation of the power to distrain did not shake their opinion; for as to them they say, 'Nor do we think that the *words used in the creation of the power to [545] distrain, extensive as they are,—“covenants, grants, and agrees, that it shall be lawful when the rent-charge is in arrear for the grantee to distrain on the premises,”—are an express covenant that he shall have power to do so. We think that “covenants and agrees” means no more than “grants.”’ Then the learned Judges proceeded to inquire whether there is any implied covenant arising out of the general words used by the grantor, and properly observe, that such a covenant must be a covenant at law, and that there cannot be a covenant implied from such words; that the covenantor had an equitable estate; and they conclude that the deed contains neither an express nor an implied covenant, of which the claimant can avail herself to enforce the payment of her jointure (*i. e.*, the charge on the land). After the most careful consideration of *every part of the deed*, I cannot bring my mind to a similar conclusion. In the course of the argument of the counsel against the claim, I have been earnestly requested to examine the whole scheme of the deed, in order to be enabled to put a satisfactory construction upon those parts of it which involve the question to be decided. Undoubtedly, as Sheppard says (*Touchstone*, 87), in the construction of all parts of all kinds of deeds, amongst the rules to be universally observed is one, ‘that the construction be made upon the entire deed, and that one part of it doth help to *ex- [546] pound another, and that every word (if it may

be) may take effect and none be rejected.' Where words are ambiguous, or the intention is not manifest and plain, it is useful and necessary to recur to other parts of the deed for interpretation: but this mode of construction is frequently invoked for the purpose of giving a different meaning to words from that which they ordinarily bear; and on the present occasion the assistance of the whole scheme of the deed seems to be used, not that every word may take effect, but for the purpose of weakening the appropriate words. It is unnecessary, in my opinion, to resort to any more of the deed, except to observe that the marriage consideration runs through every part of it. It was clearly to Phillips Monypenny's interest that Mrs. Monypenny should have a rent-charge out of his estate, and he believed himself to be the absolute owner of it. The deed therefore contains a recital that, 'upon the treaty for the marriage he had agreed to secure to her an annual sum or rent-charge, to be issuing and payable out of the manors and other hereditaments charged therewith, and of or to which he the said Phillips Monypenny is entitled or seised in fee simple;' and in the granting part, 'he gives and grants the annual sum or rent-charge to be issuing out of certain manors and lands, and generally out of messuages, lands, tenements and hereditaments in the several parishes in the county of Kent, of or to which he or any person or persons in trust for [*547] *him is or are seised or entitled for an estate of inheritance at law or in equity.' It is said that the alternate words in the recital and in the 'grant' express an uncertainty as to the nature of the title of Phillips Monypenny to the estates charged: and that, according to the case of *Right d. Jefferys v. Bucknell (d)*, they created no estoppel against Phillips Monypenny.

(d) 2 B. & Ad. (22 E. C. L. R.) 278.

But in that case the question related to two houses only, which were mortgaged, and the deed reciting that the mortgagor was legally or equitably entitled to the premises, and he covenanting that he was legally or equitably seised in his own demesne as of fee, it was clear that there was no certain or precise averment of any seisin in him. There the charge was intended to apply to various lands of the grantor; and as it is an undoubted canon of construction, that, if possible, you should give effect to every part of a deed, I find no difficulty in considering the words both in the recital and in the grant, not as expressive of any uncertainty, but as applying to lands held by different titles, and therefore, *reddendo singula singulis*, to all the lands mentioned, whether Phillips Monypenny was legally or equitably entitled to them. The effect of this mode of reading the recital and the grant will be, that the annuity will be a charge upon all the land, whether Phillips Monypenny's title to them was legal or *equitable, although the power to distrain would be limited to those only of which he had the [*548] legal estate. The converse of this is put by Lord Coke in p. 47 of his Commentary, where he says: 'If a man seised of lands in fee, and possessed of a term for many years, grant a rent out of both for life in tail or in fee, with clause of distress out of both, this rent, being a freehold, doth issue only out of the freehold, and the lands in lease are only charged with the distress.' It will be said that the words 'give, grant, bargain, and sell,' cannot operate as a covenant, because they merely assert a power to give or create an annuity; at the same time, the plain and ordinary effect of the word 'covenant' has been denied, and it has been treated as synonymous with the word 'grant.' But in construing this deed I should be much more disposed to give

the word 'grant' the operation of a covenant than to transform the word 'covenant' into a grant. It is undoubtedly law, that a deed that is intended and made to one purpose may accrue to another; for if it would not take effect in the way that it was intended, it may take effect another way: Sheppard's Touchstone, 82. There is an admirable judgment of Lord Chief Justice *Willes* on this subject in *Roe d. Wilkinson v. Tranmarr* (e), which has a considerable bearing on the point in question. There Thomas Kirby, in consideration [*549] *of natural love to his brother Christopher, and for £100, granted, released, and confirmed to Christopher the premises in question after his (Thomas's) death, and covenanted and granted that the premises should after his death be held by Christopher and the heirs of his body, and after their decease, to John Wilkinson and his heirs; and it was held that the deed would not operate as a release because it attempted to convey a freehold in future, but that it was good as a covenant to stand seised: and the Chief Justice said, 'there is likewise one thing in the present case much stronger than in any of the cases which have been cited on the one side or the other, for here is not only the word "grant," which has often been construed as a word of covenant, but likewise the grantor expressly covenants in two places in the deed, that the estate shall go to John Wilkinson in such a manner as he granted it.' In the present case, if the words creating the annual sum or yearly rent-charge are to be construed strictly as a grant and nothing more, then it was absolutely void from the first and never could have any inception, because it was not to begin until after the death of Phillips Monypenny, and, on his death, the estate on which it is charged came to an end.

(e) *Willes*, 632; 2 *Smith L. C.*, 8th ed., p. 530.

Why, under these circumstances, it being the clear intention of those parties that the deed should operate, if it could not take effect as a charge, should it not be construed to be a covenant to pay the annual sum of £300, which would be *binding upon the exe- [*550] cutors of Phillips Monypenny, though not named? It is unnecessary to multiply authorities to show that, according to what Lord *Mansfield* says, in *Lant v. Morris* (*f*), ‘no particular technical words are requisite towards making a covenant,’ for in this deed there is a clause in which this peculiar and appropriate word is to be found in giving the grantor power to distrain for the rent-charge—‘Phillips Monypenny, for himself, his heirs, and assigns, covenants, grants, and agrees.’ I asked more than once in the course of the argument, what would have been the effect of the deed if it had simply contained this clause of distress? I was not aware my question received an answer from Littleton himself; for he says, in the course of section 221: ‘Also, if one make a deed in this manner, that if A., of B., be not yearly paid at the feast of Christmas, for the term of his life, twenty shillings of lawful money, that then it shall be lawful for the said A., of B., to distrain for this in the manor of F., &c.: this is a good rent-charge, because the manor is charged with the rent by way of a distress.’ But he adds—‘And yet the person of him who makes such deed is discharged in the case of an action of annuity, because he doth not grant by his deed any annuity to the said A., of B., but granteth only that he may distrain for such annuity.’ Now upon this put the case that a *person [*551] ‘covenants, grants, and agrees’ for a power of distress for an annual sum or rent-charge upon land in which he has nothing. If it is a rule that every word

(*f*) 1 Burr. 290.

in a deed must have effect given to it if possible, and none ought to be rejected, and there is another rule that if a deed cannot take effect in the way intended, it shall take effect in another way,—why should not these words have each its due effect, and after the creation of the rent-charge by the grant of the power of distress, why should not the covenant, applied to the words ‘annual sum,’ create a personal liability in the grantor and his executors? I am aware that the grantor in this clause of distress binds only his heirs and assigns, and not his executors; and it was insisted, though not very strongly, in argument, that this showed an intention that his executors should not be bound. I inquired whether there was any authority to be found that executors in such a case would not be liable, and I was told that none had been discovered; and I should have been surprised to have learnt that, the rule being that heirs are in general only bound if named, and that executors are bound although not named, the naming the heirs for the purpose of binding them should be considered to amount to an exclusion of the executors, whom it was unnecessary to name. But had there been any such authority, I should have thought it inapplicable to the present case, in which, there being no heirs [*552] to be bound, as *there was nothing to descend, the naming them could have no greater effect than if they had been altogether omitted from the covenant.

“It is not necessary for me to consider the question as to whether a covenant could have been implied from the words of the deed, if there had been no express covenant. I proceed on the covenant, which I consider to be expressly created by the language of the parties. I think the appeal must be allowed, and the claim allowed also.”

This rule has been so admirably illustrated by another very recent case, that I have inserted the most material facts and arguments used in it, in applying and limiting the rule. This is the case of *Piggott v. Stratton*, decided by the Court of Appeal in Chancery, and is as follows:—

In 1845, Sir R. Simeon demised to William Stratton three pieces of land marked A., B., and C., Stratton covenanting not to build on the piece marked C., except in a certain manner, which would leave intervals giving a sea-view to houses built on the piece marked B. Stratton granted an underlease of part B. to one Harbour, and by the underlease covenanted to observe his own covenants in the original lease, and effectually to indemnify the underlessee, his executors, administrators, and assigns therefrom. Harbour sold and assigned his underlease to the plaintiff. Stratton afterwards surrendered the original lease, obtained another not containing the restrictive covenants, *and proceeded [*553] to build on C. in a manner which would exclude the houses on B. from the sea-view. The Lord Chancellor *Campbell*, sitting in the Full Court of Appeal, decided that the covenants in the underlease to observe those in the original lease, had the same effect as if they had been repeated in the underlease, notwithstanding that the lease was surrendered; and an injunction was granted to prevent Stratton from violating them (*g*).

“The first question,” said Lord *Campbell*, “depends upon whether Stratton is to be considered, after surrendering to Sir Richard Simeon the lease of 1845, as under a covenant to Harbour not to build houses on the land marked C. in that lease, so as to obstruct the sea-view from houses built on the land marked B., and depends entirely upon the construction of the underlease of 1851 from Stratton to Harbour, regard being

had to certain facts then existing. These facts are, that by the lease of 1845 Sir R. Simeon had demised for 999 years a part of his estate in the Isle of Wight, on the Solent, consisting of three plots marked A., B., and C., and Stratton had covenanted that he would not build houses on C. without a certain interval between them, which would have permitted a sea-view across C. from houses built on B.; that in the year 1851 Stratton [*554] proposed to underlet to Harbour *for 970 years a considerable portion of the plot marked B. for the purpose of building marine villas upon it; and that the value of such land depends materially upon the houses to be erected upon it having a view of the sea. Under these circumstances, the underlease of 1851 was executed, containing a covenant by Stratton with Harbour, by which, after a recital of the lease of 1845, Stratton, for himself, his heirs, executors, administrators, and assigns, covenanted with Harbour, his executors, administrators, and assigns, that he, Stratton, his executors, administrators, and assigns, would thenceforth observe the lessee's covenant contained in the same lease. The underlease does not repeat the words of the covenant in the lease as to the interval to be left between the houses to be built on C. But *verba relata inesse videantur*; and according to the dictum of *Parke*, B., in *Doughty v. Bowman* (*h*), 'A covenant to perform the covenants of a lease has no other effect than if the former covenants had been inserted.' I conceive, therefore, that this covenant in the underlease was tantamount to a covenant by Stratton, for himself, his heirs, executors, administrators, and assigns, not to build houses on C. without leaving the stipulated interval between them. Is not this covenant still binding on Stratton? He admits that it was binding on him until

(*h*) 11 Q. B. (63 E. C. L. R.) 454.

he surrendered *the lease of 1845, and that until then an injunction might have been obtained by Harbour against his building houses on C. [555] contrary to the covenant. He now relies upon the surrender. I entirely concur in the general maxim, that a covenant to perform the covenants of a lease, is only binding during the subsistence of the lease; but, *looking to the covenant in this underlease*, it is evident to me that the parties *intended* that, in as far as it conferred any benefit upon Harbour, it should remain in force during the currency of the underlease. Harbour acquired a material benefit by Stratton's covenant with him to perform the covenant in the lease from Sir R. Simeon as to the mode in which the houses were to be erected between B. and the margin of the Solent. It cannot properly be called an easement or servitude over C. But Harbour acquired a right to an immunity which materially enhanced the value of the land which was sub-let to him, and restrained the use of part of the land demised to Stratton. If there had been in the underlease a direct, express, or specific covenant by Stratton that, during the currency of the underlease, he would not build upon C. so as to injure the prospect from B., it was not contended that this covenant would have been affected by the surrender. But I conceive that the covenant to perform all the covenants in the lease which contained such a covenant, is exactly equivalent. When Stratton had sub-let B., at the same *time restraining the mode of enjoying C. dur- [556] ing the currency of the underlease, he could not by any surrender derogate from the right which Harbour had acquired. Harbour was a stranger to the surrender, and could not be prejudiced by it.

“ If Stratton, before the surrender of the lease of 1845, is supposed to have covenanted in the underlease to Har-

bour so as to give Harbour an interest in any part of the land devised by the lease of 1845, upon that interest the subsequent surrender could have no operation. That such was the intention of the parties when the underlease of 1851 was executed, I cannot doubt, and I think that this *intention* is sufficiently *manifested by the language they have employed*.

“To get at the intention of covenants it is not necessary to look for any technical form of words. The principles upon which covenants are to be construed are elaborately and lucidly laid down and illustrated in the judgment of Lord Chancellor *Chelmsford* in the case of *Monypenny v. Monypenny*, in which he overruled (I think very properly) the judgment of two Common Law Judges, who had departed from these principles.”

The few strong expressions used by Lord *Tenterden* in the case of *Doe d. Bywater v. Brandling* (i), as to the mode of construing Acts of Parliament, are equally [*557] applicable to the mode of *construing contracts; and their reasonableness will appear from the mere enunciation of them:—“We are to look, not only at the language of the preamble or of any particular clause, but at the language of the whole Act; and if we find in the preamble or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect from the more large and extensive expressions used in other parts the real intention of the Legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble or in any particular clause.” In like manner, general words may be restrained by the recital, where

(i) 7 B. & C. (14 E. C. L. R.) 660.

it is evident from the whole agreement that they were intended to apply to the matter recited. Thus, a deed recited that disputes were subsisting between Simons and Johnson, about which actions at law had been brought, and that it had been agreed, in order to put an end thereto, that each of them should execute a release of all actions and causes of action, claims, and demands which each of them then had or might claim by reason of anything whatsoever. "I cannot read this," said Lord *Tenterden*, "without seeing that the release which follows was intended to apply to the matter recited, namely, the actions then depending, and that the object was to put an end to them. The generality *of the language was, then, confined by the [*558] recital" (*k*).

An important instance of the rule which we have been considering, is, that where general words follow others of more particular meaning, they are to be construed as applicable to things *ejusdem generis* with the former particular words (*l*). Thus, an action was brought upon a policy of insurance in the ordinary form, wherein the perils which the insurers are to bear are stated to be "of the sea, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainment of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise and ship, &c., or any part thereof." The facts of the

(*k*) *Simons v. Johnson*, 3 B. & Ad. (23 E. C. L. R.) 175; *Payler v. Homersham*, 4 M. & Sel. 423.

(*l*) *Cullen v. Butler*, 5 M. & Sel. 461; *Naylor v. Palmer*, 22 L. J. (Ex.) 329; 8 Exch. 739 S. C.; *Jones v. Nicholson*, 23 L. J. (Ex.) 330; 10 Exch. 28 S. C.; *Lozano v. Janson*, 23 L. J. (Q. B.) 337. See also *ante*, p. *279.

case were, that the ship and goods had been sunk at sea by another and friendly vessel firing upon her, mistaking her for an enemy ; and the question was, whether the injury was within the general words with which the perils enumerated were concluded. The Court decided

[*559] *that the assured was entitled to recover, as the loss was of the same kind as the perils expressly mentioned, and was, therefore, within the general terms. “If,” said Lord *Ellenborough*, in delivering the judgment of the Court of King’s Bench, “it be a loss by perils of the sea, merely because it is a loss happening upon the sea, as has been contended, all the other causes of loss specified in the policy are, upon that ground, equally entitled so to be considered ; and it would be unnecessary ever to assign any other cause of loss than a loss by perils of the sea. But, as that has not been the understanding and practice on the subject hitherto, and inasmuch as the very insertion of the general or sweeping words, as they are called, in the policy after the special words, imports that the special words were not understood to include all perils happening on the sea, but that some more general words were required to be added in order to extend the responsibility of the underwriters unequivocally to other risks not included within the proper scope of any of these enumerated perils, I shall think it necessary only to advert shortly to some of the reasons upon which we think that the general words, thus inserted, comprehend a loss of this nature. The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in [*560] *furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by

the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes (*m*)."

Another very clear example (*n*) of the same rule is afforded by a case where a ship loaded with corn was forced by stress of weather into Elly harbour, in Ireland, and there happening to be a great scarcity of corn there at the time, the people came on board the ship in a tumultuous manner, took the government of her, and suffered her to drive on rocks, where she was stranded. The question was whether she was detained by people as in the policy above mentioned. "The word 'people,'" said Mr. Justice *Buller*, "in the policy means the supreme power, the power of the country, whatever it may be. This appears clear from another part of the policy; for when the underwriters insure against the wrongful acts of individuals, they describe them by the names of *pirates, rovers, thieves; then, having stated all the individual persons against whose acts they [*561] engage, they mention other risks, those occasioned by the acts of kings, princes, and people of what nation, condition or quality soever. These words, therefore, must apply to nations in their collective capacity." They did not, therefore, include a mob of rioters.

It is obvious, that, if the whole of the agreement is to be considered, the place where it was made (*o*), the time when, the objects of the parties, and the department of science and art, trade or commerce, to which

(*m*) *Cullen v. Butler*, *supra*.

(*n*) *Nesbitt v. Lushington*, 4 T. R. 783; *Glaholm v. Hays*, 2 M. & Gr. (40 E. C. L. R.) 257.

(*o*) See *Pust v. Dowie*, 33 L. J. (Q. B.) 172.

the subject-matter of it belongs, must be regarded ; for, otherwise, the meaning of words which have peculiar acceptations at different times and places, and in relation to different subject-matters, cannot be accurately understood. But bearing in mind these observations as to the peculiar meaning which words sometimes bear, and to the context of the whole contract, the usual and proper mode of understanding words is according to their ordinary sense and meaning (*p*). Of this mode the case of *Barton v. Fitzgerald* (*q*), is a strong instance. In this case the defendant, by deed reciting a lease for [*562] the term of ten years, which by *several assignments had come to him, and that the plaintiff had contracted for the absolute purchase of the premises, assigned them to the plaintiff for the residue of the term in as ample a manner as he held the same, and covenanted that it was a good and subsisting lease, valid in law, and not forfeited or otherwise determined or become void or voidable. The fault was, that the original lease was for ten years determinable on a life which fell before the ten years expired, but after this assignment to the plaintiff. And the Court held, that the plain and absolute terms of the covenant must have their full meaning, and that consequently it had been broken by the defendant ; although there was another covenant against incumbrances confined to such as were created by the defendant, and those who might claim under him, and a covenant for quiet enjoyment restrained in the same manner (*r*). Another instructive instance of the rule of giving to each word its ordinary and popular meaning as evidently affected by the con-

(*p*) See *per* Lord *Wensleydale* in *Grey v. Pearson*, 6 H. L. C. 61, 106 ; *per* *Jessel, M. R.*, in *Ex parte Walton, in re Levy*, 17 Ch. Div. 746, 750 ; 50 L. J. (Ch.) 657, 659.

(*q*) 15 East, 530.

(*r*) See *Worthington v. Warrington*, 5 C. B. (57 E. C. L. R.) 635.

text or circumstances before mentioned, is furnished by the case of *Lord Dormer v. Knight* (s), in which a deed had been executed by the defendant, granting an annuity for the use of his wife; provided that, if she should associate, continue to keep company with, or cohabit, or criminally correspond with a person named, the annuity should cease. It *was held that all intercourse, however innocent, was prohibited. “The words of the deed,” [*563] said the Court, “are as general as can be, and go much further than the exclusion of criminal cohabitation. The intention was to put a stop to all intercourse whatever between these two persons. The receiving a person’s visits whenever he chooses to call, is associating with him. The parties have chosen to express themselves in these terms, and the words must receive their common meaning and acceptation.” In like manner, where a warrant of attorney had been given to the plaintiff by the defendant, but it was agreed not to enter up judgment upon it unless the defendant should dispose of his business or become bankrupt or insolvent, it was held that the latter words meant a general inability to pay his debts, and not merely his having recourse to the protection of the Insolvent Courts (t).

But a very little consideration will show that the rule of understanding the words and sentences in their ordinary meaning, when it is not restrained by the context, is perfectly consistent with the rule that the whole context is to be considered; which is, indeed, the just rule of interpretation, and is very conveniently couched in the ancient maxim of the law, *Ex antecedentibus et consequentibus fit optima interpretatio* (u)

(s) 1 Taunt. 417.

(t) *Biddlecombe v. Bond*, 4 Ad. & E. (31 E. C. L. R.) 332.

(u) 1 Shep. Touch. 87; *Coles v. Hulme*, 8 B. & C. (15 E. C. L. R.) 568.

[*564] *These are the principal rules for the construction of contracts. There are others, less general, which are sometimes referred to. They will be found very clearly treated of in Broom's Maxims, last edition; and both these and the more general rules which it has been attempted to illustrate in this volume, are explained at large in Sheppard's Touchstone; in which book, indeed, many of the topics treated of in these Lectures will be found explained in the most scientific and masterly manner.

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